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RETURNED TO J. P.
MARCH. 1967

COMPILATION

OF

PUBLIC TIMBER LAWS

AND

REGULATIONS AND DECISIONS THEREUNDER.

ISSUED JANUARY 21, 1897.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1897.

U.S.-Dept. of the interior-General land office.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 21, 1897.

The following compilation of existing laws relative to timber on the public lands, with the rules and regulations thereunder, and decisions, opinions, and rulings in relation thereto, is issued for the information of those concerned.

S. W. LAMOREUX,
Commissioner.

SYNOPSIS OF LAWS RELATING TO TIMBER ON PUBLIC LANDS.

Section 2461, U. S. R. S., provides a fine of not less than triple the value of the timber and imprisonment not exceeding twelve months in instances in which timber is cut or removed from public lands reserved or purchased for the use of the Navy or from any other public lands for use other than for the Navy of the United States. (See sec. 4751, U. S. R. S.) See also the following: Act of March 1, 1817, 3 Stat., 347 (secs. 2458 and 2459, U. S. R. S.); and act of February 23, 1822, 3 Stat., 651 (sec. 2460, U. S. R. S.).

Section 2462, U. S. R. S., provides for the forfeiture to the United States of any vessel having on board, with knowledge of the master, owner, or consignee, timber taken from Naval Reserve or other public lands with intent to transport the same to any port or place within the United States or for export to any foreign country, and further provides that the captain or master of such vessel shall pay to the United States a sum not exceeding $1,000. (See sec. 4751, U. S. R. S.)

Section 2463, U. S. R. S., provides that collectors of customs in Alabama, Mississippi, Louisiana and Florida, before allowing clearance to any vessel having on board live-oak timber, must ascertain that the same was cut from private lands, or if from public lands, by consent of the Navy Department; and also provides that timely prosecution be instituted against parties guilty of depredations on live oak in those States. (See secs. 4205 and 4751, U. S. R. S.)

Section 4205, U. S. R. S., reads as follows: "Collectors of the collection districts within the States of Florida, Alabama, Mississippi, and Louisiana, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, shall ascertain satisfactorily that such timber was cut from private lands, or if from pnblic lands, by consent of the Department of the Navy." (See sec. 2463.)

Section 4751, U. S. R. S., provides that all penalties and forfeitures under sections 2461, 2462 and 2463 shall be recovered, etc., under the direction of the Secretary of the Navy—one-half to be paid to the informers or captors and the other half to the Secretary of the Navy; and also authorizes the Secretary to mitigate any fine, penalty or forfeiture so incurred.

Section 5388, U. S. R. S., provides a fine of not more than $500 and imprisonment not more than twelve months in every instance in which timber is unlawfully cut or injured on lands reserved or purchased for military or other purposes. (See secs. 2460 and 2463, U. S. R. S. See also act of June 4, 1888; 25 Stat., 166, amending this section.)

Act of March 3, 1875 (18 Stat., 481), section 1 provides a fine of not exceeding $500 or imprisonment not exceeding twelve months in instances in which ornamental or other trees on surveyed public lands which have been reserved have been cut or injured. Section 2 provides a fine not exceeding $200 or imprisonment not exeeding six months for the breaking open or destroying of any gate, fence, hedge, or wall inclosing any lands reserved or purchased by the United States. Section 3 provides a penalty of not exceeding $500 or imprisonment not exceeding twelve months for the breaking in of any inclosure around lands reserved or purchased by the United States, and permitting cattle, horses and hogs to enter therein when they may or can destroy the grass, trees, or other property of the United States.

Act of March 3, 1875 (18 Stat., 482), grants the right of way through the public lands of the United States to any railroad company which has filed with the Secretary of the Interior due proof of its organization, etc., and also the right to take from lands adjacent to the line of the road timber necessary for the *construction* of the road.

The several land grants to railroads also authorize them to cut timber from public lands for *construction* purposes. This authority, however, is confined strictly to timber for construction purposes in every grant except that to the Denver and Rio Grande Railroad, which authorizes said road to take timber for *repairs* also on the part of the line constructed thereunder.

Act of September 29, 1890 (26 Stat., 496) forfeited the grants to all uncompleted railroads to the extent of the grants for the unconstructed portions of such roads.

Act of April 30, 1878 (20 Stat., 46), section 2, provides that if any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found.

Act of June 3, 1878 (20 Stat., 88), authorizes citizens and bona fide residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana and all other mineral districts, to use for building, agricultural, mining or other domestic purposes, timber on public lands therein, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry.

Act of June 3, 1878 (20 Stat., 89), section 1, provides for the sale of unreserved, unoffered surveyed public timber lands in California, Oregon, Nevada and Washington, in quantities not exceeding 160 acres, to any one person or association of persons, at $2.50 per acre. Section 4 prohibits the cutting, removing or destroying of any timber on public lands in the States named with intent to export or dispose of the same, under penalty to the trespasser and the owner or consignee of any vessel or railroad on which the timber is transported, of a fine of not less than $100 nor more than $1,000; and provides "that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Section 5 provides that any person who is prosecuted in the States named for trespass under section 2461, U. S. R. S., if not for export from the United States, may be relieved from prosecution by paying a sum equal to $2.50 per acre for the land on which the timber was cut.

This act is made applicable to all the public-land States by act of August 4, 1892 (27 Stat., 348).

Act of June 15, 1880 (21 Stat., 237), provides that where timber was unlawfully cut from public timber lands prior to March 1, 1879, and the lands have subsequently been entered and the Government price paid therefor in full, no criminal proceedings for trespass shall be further maintained; and no civil suit shall be maintained for timber taken in clearing the land for cultivation, or working a mining claim, or for agricultural or domestic purposes, or for maintaining the improvements of a settler, etc., or for timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for same, or for any alleged conspiracy in relation thereto.

Act of June 4, 1888 (25 Stat., 166), provides as follows: "That section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: 'Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court.'"

Act of February 16, 1889 (25 Stat., 673), provides that the President may authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, remove and dispose of the dead or down timber thereon, for the sole benefit of the Indians.

It is further provided that whenever there is cause to believe that the timber has been killed or otherwise injured for the purpose of securing its sale under this act, such authority shall not be granted.

Act of March 3, 1891 (26 Stat., 1093), entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one," etc., provides that "in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

(See below act of February 13, 1893 (27 Stat., 444), extending this act to New Mexico and Arizona.)

Section 24 of the act of March 3, 1891 (26 Stat., 1095), provides for the establishment of forest reservations in any State or Territory having public lands bearing forests.

Act of August 4, 1892 (27 Stat., 348), extends the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 13, 1893 (27 Stat., 444), extends the provisions of the act of March 3, 1891 (26 Stat., 1093), to include the Territories of New Mexico and Arizona.

Act of January 19, 1895 (28 Stat., 634), provides for the utilization of burned timber on certain unperfected homestead entries in Wisconsin, Minnesota and Michigan.

Section 2 of the act of February 20, 1896 (29 Stat., 11), to open certain forest reservations in the State of Colorado for the location of mining claims, authorizes the owners of such claims to fell and remove therefrom for actual mining purposes in connection with the particular claim from which the timber is felled or removed, but prohibits the felling or removing of timber from any other portions of said reservations by private parties for any purpose whatever.

Act of February 24, 1897 (29 Stat., 594), entitled "An act to prevent forest fires on the public domain," provides, "that any person who shall wilfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other imflammable material, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

"SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of

the same, shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

"SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situate."

Act of February 26, 1897 (29 Stat., 599), entitled "An act concerning certain homestead lands in Florida," provides "that all persons actually occupying homesteads in good faith in any of the following-named counties in said State of Florida, to wit, Alachua, Lafayette, Levy, Suwannee, Bradford, Baker, and Columbia, at the time of the storm on or about September twenty-ninth, eighteen hundred and ninety-six, are hereby granted the right to sell or otherwise dispose of the fallen timber on their homestead entries felled by said storm, and to devote the proceeds of such sale or barter to the improvement of their homesteads or support of themselves or their families."

RECAPITULATION.

ACTS FOR THE PROTECTION AND PRESERVATION OF PUBLIC TIMBER.

Section 2460, U. S. R. S. Authorizing use of Army and Navy to prevent timber depredations in Florida.

Section 2461, U. S. R. S. Prohibiting the cutting of timber from any public lands for any purpose whatever, except for the use of the Navy of the United States.

Section 2462, U. S. R. S. Providing penalties for transporting or exporting any timber cut from any public lands not reserved or purchased for furnishing timber for the Navy.

Sections 2463 and 4205, U. S. R. S. Providing that collectors of customs in Alabama, Florida, Louisiana and Mississippi must see to it that no live-oak timber is transported or exported out of said States.

Section 4751, U. S. R. S. Providing relative to recovery and disposition of penalties and forfeitures under sections 2461, 2462 and 2463.

Section 5388, U. S. R. S. Prohibiting the cutting or destroying of timber on reserved lands (Amended by act of June 4, 1888; 25 Stat., 166.)

Act of March 3, 1875 (18 Stat., 481). Prohibiting the cutting, destroying or injuring of any trees on reserved lands.

Act of April 30, 1878, section 2 (20 Stat., 46). Providing that if any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found.

Act of June 3, 1878, section 4 (20 Stat., 89). Prohibiting the cutting of timber in California, Oregon, Nevada or Washington, for export, disposal or transportation.

This act is made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348).

Act of June 4, 1888 (25 Stat., 166). Prohibiting the cutting of timber on lands reserved for military or other purposes, or on Indian reservations, etc.

Act of March 3, 1891 (26 Stat., 1095). Authorizing the President of the United States to make forest reservations.

Act of August 4, 1892 (27 Stat., 348). Extending the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 20, 1896 (29 Stat., 11). Opening certain forest reservations in the State of Colorado for the location of mining claims.

Act of February 24, 1897 (29 Stat., 594). To prevent forest fires on the public domain.

ACTS AUTHORIZING THE USE OF PUBLIC TIMBER.

Act of March 3, 1875 (18 Stat., 482). Authorizing right-of-way railroads to procure timber from public lands for construction purposes.

The several acts making land grants to railroad companies.

Act of June 3, 1878 (20 Stat., 88). Authorizing the cutting of timber from public mineral lands in Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana for domestic purposes.

Act of June 3, 1878 (20 Stat., 89). Authorizing the sale of public timber lands in California, Oregon, Nevada and Washington, and the cutting of timber by miners and agriculturists for use on their claims, and the taking of timber for the use of the United States.

This act, by the act of August 4, 1892 (27 Stat., 348), is extended to all the public-land States.

Act of February 16, 1889 (25 Stat., 673). Authorizing Indians on reservations to cut, remove and dispose of dead and down timber.

Act of March 3, 1891 (26 Stat., 1093). Authorizing the cutting of timber in Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Alaska, Nevada and Utah for all domestic purposes.

The act of February 13, 1893 (27 Stat., 444), extends the operation of this act to New Mexico and Arizona.

Act of August 4, 1892 (27 Stat., 348). Extending the provisions of the act of June 3, 1878 (20 Stat., 89), to all the public-land States.

Act of February 13, 1893 (27 Stat., 444). Extending the provisions of the act of March 3, 1891 (26 Stat., 1093), to include the Territories of New Mexico and Arizona.

Act of January 19, 1895 (28 Stat., 634). Providing for the utilization of burned timber on certain unperfected homestead entries in Wisconsin, Minnesota and Michigan.

Act of February 20, 1896 (29 Stat., 11). Opening certain forest reservations in the State of Colorado for the location of mining claims.

Act of February 26, 1897 (29 Stat., 599). Providing for the utilization of certain felled timber on unperfected homestead entries in certain counties in Florida.

In addition to the above specific legislation in respect to timber on public lands the inceptive rights acquired by a homestead claimant are held to extend to the use of so much timber as it may be necessary to fell or remove in clearing the land for cultivation, or for buildings, fences, or other improvements on the land. See United States *v.* Levi W. Nelson (5 Sawyer, 68), cited on page 83; also, Shiver *v.* United States (159 U. S., 491), cited on page 89.

SUMMARY.

The foregoing synopsis shows that section 2461, U. S. R. S. (act of March 2, 1831; 4 Stat., 472), constitutes the original policy respecting public timber and the extent to which certain of the subsequent acts operate as modifications of same.

COMPILATION OF PUBLIC TIMBER LAWS AND REGULATIONS AND DECISIONS THEREUNDER.

SECTION 2461, U. S. R. S.

(Act of March 2, 1831; 4 Stat., 472.)

If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the Navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live-oak or red-cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the Navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months. (See sec. 4751.)

TIMBER DEFINED.

UNITED STATES *v.* STORES AND ANOTHER.

Circuit court, southern district of Florida (14 Fed. Rep., 824).

PENALTY—CUTTING TIMBER ON PUBLIC LANDS—"TIMBER" DEFINED.

The term "timber," as used in section 2461, Revised Statutes, does not apply alone to large trees fitted for house or ship building, but includes trees of any size, of a character or sort that may be used in any kind of manufacture or the construction of any article.

PENALTY—PROSECUTION FOR—USE OF TREES NO JUSTIFICATION.

Using trees for firewood or burning into charcoal is no justification of the cutting.

SAME—HOMESTEAD ENTRY—NO EFFECT ON TITLE.

A homestead entry works no change in the title of lands which can prevent a prosecution under the said section.

UNITED STATES *v.* PETER DARTON.

Circuit court of the United States (6 McLean, 46).

Under the act of 1831, for the punishment of offenses in cutting and removing timber from the United States lands, the rule of proof is fixed by the statute. The Government must prove the cutting on the lands specified; the defendant may rebut the same by showing circumstances of ignorance as to the section lines or mistake.

The proof must correspond with the charge—cutting oak is not cutting pine timber.

The proof of the act places the burden of explanation on the defendant. From an unlawful act an unlawful intent will be inferred.

A reasonable doubt is that which relates either to the character or the force of the testimony, and not a mere conjecture.

WILKINS, J.

The defendant was tried on an indictment charging him with removing and cutting timber on Government lands. The testimony showed that his father owned a mill seat and various tracts of land in the vicinage of the lands described in the indictment; that he resided at the mill, as the agent of his father who lived in Chicago, and was under instructions to avoid cutting on the Government lands; that a number of trees were cut by mistake across the lines, which were subsequently ascertained by actual survey, the defendant accompanying the surveyor, and showing the corner posts; and when he ascertained that he had cut over his lines he wrote to his father, and caused the quarter section on which the timber was cut to be entered at the Land Office, the certificate of which was given in evidence.

It was contended on the part of the Government—

First. That circumstances showing ignorance and mistake, if believed by the jury, constituted no defense.

Second. That a *subsequent* entry of the lands was no defense.

CHARGE OF THE COURT.

The prisoner at the bar, Peter Darton, whose true deliverance between him and the United States, you are obligated by your solemn oaths to make, according to the evidence given you in court, is charged with timber cutting and timber removing on and from the lands of the United States. The peculiar offense is created by and defined and described in the statutes of the United States.

The act of March 2, 1831, by its second section, constitutes three general classes of offenses, with their respective accessorial subdivisions.

The court will enumerate them in their order, that you may be better enabled to understand the particular offense now under consideration.

The first is the *cutting* and *removing* naval timber, specifically named *red cedar* and *live oak*, on lands specially selected and reserved by the Government, or aiding in such acts, or wantonly destroying on such lands, such naval timber.

By a previous enactment of Congress, the 1st of March, 1817, entitled "An act," making reservation of certain public lands "to supply timber for naval purposes," it was made the duty of the Secretary of the Navy, under the direction of the President of the United States, to cause such vacant and unappropriated public lands as produced the live-oak and red-cedar timbers to be explored and to select such tracts as, according to his judgment, were necessary to furnish the Navy of the United States a sufficient supply of naval timber.

It was then declared an offense, punishable by fine and imprisonment, for any person to cut *any timber* on such reserved tracts, *without authority to do so by order of a competent officer.*

At the same time it was declared criminal to cut or remove, or be employed in removing, the naval timber specified, with intent to dispose of the same for transportation, from the same description of the public lands.

Such, with other measures of a penal character, and with the avowed design of preserving a supply of timber for the United States Navy, were the salutary provisions of the statute of 1817.

But the Government was the proprietor of other lands, on which grew other timber, valuable in a great degree for other purposes than shipbuilding. Much of these lands were surveyed by and under national authority, and by various statutory enactments were opened to settlements, and offered at a *fixed* price, which could neither be augmented nor lessened by demand.

The policy of these statutes was twofold: First, the speedy settlement of the public domain, and thereby converting the wilderness into a garden; and the acquisition of a revenue from the public sales. In furtherance of both objects it was desirable that the lands should be so far protected from spoliation as to encourage immigration and induce settlement and sale.

Moreover, it was discovered that the protection afforded by the act of 1817 was not sufficiently extensive as to naval timber growing elsewhere than on the reservations; and the public lands in the North and Southwest, being repeatedly stripped of valuable house timber by lawless trespassers, the national Legislature was moved to amend and enlarge the provisions of the act of 1817 by those of 1831, embracing *other* lands than the reserved lands, naval timber on *other* lands, and *other* timber than naval timber on the unreserved public lands of the United States. Thus originated the other two classes as designated in the first section of the last act, namely:

Second. The offense of cutting naval timber on other lands, etc.

Third. The offense of cutting or removing, etc., *other* timber than

naval timber on *other* lands than naval lands, with the intent to *export*, dispose of, use, or employ the same *in any manner whatsoever, other than for the use of the Navy of the United States.*

This last comprehends the charges set forth in this indictment, which contains four counts.

* * * * * * *

Before any application of the law to the facts of this case the court will briefly detain your attention on two prominent propositions involved:

First. What must be proved by the Government in order to sustain the prosecution.

Second. What must be proved by the defendant, in case the Government has made a case to warrant a conviction, as matter of complete exculpation.

What must be proved by the Government. The rule of proof is fixed by the statute. The offense is cutting or removing timber from Government lands, with the evil intent described.

The fact then must be fully established by conclusive proof that timber of the kind described was cut by the defendant or by his procurement, and that the same was cut on the township and section and range specially set forth. Cutting *other* timber than that charged will not suffice. If pine trees or pine logs are charged, proof of oak or hickory will not do. And so also, if the cutting is on *other* lands the proof will not do. The defendant must be acquitted.

But, gentlemen, if the specific act of cutting or removing is proved, the guilty—the unlawful intent—will be presumed. From an unlawful act an unlawful intent will be inferred. The statute declares the act criminal. Proof of the commission of the act raises the presumption of a guilty knowledge and a guilty intention. * * *

But this presumption may be rebutted by the evidence of circumstances showing a lawful intention. * * * An evil intent is an essential ingredient of every crime. And the statute does not contemplate the punishment of the innocent. An unlawful act with a lawful intention is not criminal.

* * * Understand this: The Government must prove two prominent facts—the *cutting and the premises where cut.* If such proof corresponds with the allegations of the indictment, and there is no explanatory proof rebutting an unlawful intention, your verdict must be guilty.

But otherwise, after such proof on the part of the Government, if the defendant clearly shows that a mistake was committed by the defendant himself, or by the hands under his direction, in regard to the lines of survey. * * *

* * * * * * *

Now, the United States, as a great land proprietor, is not inhibited the usual civil remedy allowed to and provided for all for any loss or injury sustained. The courts of justice are open to the civil actions of

the Government as to those of an individual. But there is a vast difference in the rule of judgment between the civil action and the criminal verdict. In the former, the proof of the injury and its extent calls justly for the rendition of appropriate damages, and the plea of ignorance or mistake or an innocent intention availeth not. The injury is done; the ignorant trespasser must repair the loss. So with the Government. Its landed dominion is under the protection of the general law, independent of the statute of 1831. The action of trespass is an action to which the Government may resort, and under which it may recover damages to the full extent of the injury sustained.

And a conviction and punishment of a defendant for a trespass, under the act of 1831, would not protect, under a civil action, for the injury sustained. Neither would a judgment, on the latter remedy, be a sufficient plea of defense under the indictment.

* * * * * * *

The jury found a verdict of guilty.

LIABILITY.

CRIMINAL LIABILITY.

The penal act of March 2, 1831, 4 Stat., 472 (section 2461, U. S. R. S.), provides "for the punishment of offenses committed in cutting, destroying, or removing live oak and other timber or trees preserved for naval purposes."

This act of March 2, 1831, was fully considered in the case of the United States *v.* Ephraim Briggs (9 Howard, 351), in which the Supreme Court decided that the said act authorized the prosecution and punishment of all trespassers on public lands by cutting timber, whether such timber was fit for naval purposes or not.

THE UNITED STATES *v.* EPHRAIM BRIGGS.

(9 Howard, 351.)

On the 2d of March, 1831, Congress passed an act (4 Stat., 472), entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live-oak or other timber or trees reserved for naval purposes."

The act itself declares, that every person who shall remove, etc., any live-oak or red-cedar trees or other timber, from any other lands of the United States, shall be punished by fine and imprisonment.

The title of the act would indicate that timber removed for naval purposes was meant to be protected by this mode, and none other. But the enacting clause is general, and therefore cutting and using of oak and hickory, or any other description of timber trees from the public lands, is indictable and punishable by fine and imprisonment.

See also decision in case of Forsyth *v.* United States (9 Howard, 571).

THE UNITED STATES *v.* REDY.

United States circuit court (5 McLean, 358).

Under the act of Congress, it is not necessary to describe in an indictment for trespass on the public lands, every kind of timber that was cut.

It is sufficient to name one or more species, and in the words of the statute allege other timbers.

An indictment will lie for cutting timber on any of the public lands, though it may not have been reserved for naval purposes.

OPINION OF THE COURT.

This is an indictment for cutting walnut and other trees on the public lands of the United States. It was objected that no other timber except what is named in the indictment can be proved. But the court held that under the allegation of other timber, proof other than walnut trees was admissible to the jury.

An objection was also made, that an indictment would not lie for a trespass on the public lands, unless such lands had been reserved for naval purposes. But the court ruled an indictment could be sustained, under the decisions, for the cutting of timber on the public lands which had not been reserved for naval purposes.

The court instructed the jury must be satisfied that the person who cut the timber was employed by the defendant, and that the timber was cut by his direction. If this be proved, the defendant is answerable, under the law, the same as if the defendant had in person committed the trespass.

The jury found the defendant not guilty.

UNITED STATES *v.* THOMPSON.

In the circuit court of the United States (6 McLean, 56.)

Not necessary, in an indictment for cutting timber, to state the class of lands from which the trees were cut.

Such a description as shows the accused the offense with which he is charged, is sufficient.

Where a statute creates an offense, and the indictment charges the same in the precise words of the statute, it is unnecessary to prefix to the charging words, the word "unlawful," or any other word showing a wrongful intention.

UNITED STATES *v.* STONE.

District court, district of Idaho (49 Fed. Rep., 848).

PUBLIC LANDS—TIMBER TRESPASS.

Criminal proceedings may be maintained under section 2461, U. S. R. S., for a violation of its provisions; and it is sufficient to allege in the indictment that the cutting and removing of the timber was for use other than that of the Navy of the United States. It is not necessary to allege that defendant was not justified under any of the various land laws of the United States.

SAME.

Charging the "cutting and removing" of timber does not constitute the allegation of two offenses to one count.

TRESPASS THROUGH NEGLIGENCE.

In an action to recover a statutory penalty for the cutting of trees, defendant is liable for careless as well as wilful cutting, and can not escape liability by showing that he turned his servants into an unenclosed lot, with instructions to cut only his trees, without approximately indicating to them the boundaries of his land. (United States Digest, Vol. XIV, 803; Keirn *v.* Warfield, 60 Miss., 799.)

SECTION 2461, U. S. R. S., NOT REPEALED BY THE ACTS OF JUNE 3, 1878 (20 STAT., 89), AND AUGUST 4, 1892 (27 STAT., 348).

See Commissioner of the General Land Office to the Secretary of the Interior, May 16, 1896, cited on page 74.

CRIMINAL LIABILITY FOR PUBLIC TIMBER TRESPASS CAN NOT BE COMPROMISED.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., March 3, 1884.

SIR: I have the honor to return herewith a communication addressed to you by the honorable Secretary of the Interior with its inclosures relating to the offer of W. S. Harrison to pay $50 in compromise of a criminal action pending in the northern judicial district of Florida, brought because of a trespass on the public lands.

The papers were referred to this office the 25th ultimo.

A criminal liability of this nature can not be compromised, and I have informed the United States attorney of this fact. * * *

Very respectfully,

J. H. ROBINSON,
Acting Solicitor of the Treasury.

Hon. CHARLES J. FOLGER,
Secretary of the Treasury.

CIVIL LIABILITY.

UNITED STATES ENTITLED TO CIVIL REMEDIES.

Attorney General Wirt, in an opinion of the 27th of May, 1821, holds as follows:

> Independent of positive legislative provisions, I apprehend that, in relation to all property, real or personal, which the United States are authorized by the Constitution to hold, they have all the CIVIL remedies, whether for the prevention or redress of injuries, which individuals possess. (See 3 Wheaton, 181.) So the United States, being authorized to accept and to hold these lands for the common good, must have all the legal means of protecting the property thus confided to them that individuals enjoy in like cases. * * * They are, therefore, in my opinion, entitled to the injunction of waste by way of prevention, and to the action of trespass by way of punishment, in like manner as individuals, similarly situated, are entitled to them.

Attorney-General Taney, afterwards Chief Justice of the United States, in an opinion of 22d of August, 1833, cites this opinion of Mr. Wirt, and concurs in it.

UNITED STATES *v.* LEE.

(106 U. S., 222.)

* * * * * * *

Another consideration is, that since the United States can not be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of Carr *v.* United States, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights.

* * * * * * *

RIGHT TO PURSUE AND RECLAIM PROPERTY.

Justice demands, therefore, and the law concedes that the owner of personal property may pursue and reclaim the chattel wherever he can find and identify it. (Schouler's Personal Property, vol. 2, p. 21.)

COTTON *v.* UNITED STATES.

(11 Howard, 229.)

The United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands.

This case was brought up, by writ of error, from the district court of the United States for the northern district of Florida.

It was an action of trespass *quare clausum fregit* brought by the United States for cutting trees upon public lands, commenced in the superior court of West Florida in 1844, to which the defendant pleaded not guilty on the 26th of March, 1845. The cause remained pending in said court until the 15th of January, 1848, when, in pursuance of the act of the 22d February, 1847 (ch. 17, sec. 8), it was transferred to the United States district court for the northern district of Florida, and was ordered to stand for trial at the ensuing March term.

At that term the defendant appeared, and on leave filed a demurrer to the declaration, which, after argument, was overruled, and the cause set down for trial on the plea of not guilty.

The cause having come on, the defendant requested the court to charge the jury—

First. That the only remedy for the United States for cutting pine timber on the public lands was by indictment.

Second. That the United States have no common-law remedy for private wrongs.

Third. That the right of the United States to bring this action must be derived either from an act of Congress or from the law of some State in which the contract was made by which it acquired the property on which this trespass is alleged to have been committed.

Fourth. These lands were acquired by treaty from Spain, and that the United States has no common-law remedy for trespass committed thereon; and that Congress not having authorized the exercise of this remedy the plaintiff ought not to recover any damages.

Which charge the court refused to give, whereupon the defendant excepted.

The jury found the defendant guilty of the trespass, and assessed the damages of the United States at $362.50, for which amount, and $122.22 costs, judgment was entered up. A motion in arrest of judgment was overruled.

The Supreme Court having at the last term decided that it had jurisdiction in cases like this under the act of the 27th of February, 1847, without reference to the amount in controversy, the case now came before the court on the points raised by the bill of exceptions. (9 How., 579.)

It was argued by Mr. Walker for the plaintiff in error and Mr. Crittenden (Attorney-General) for the United States.

Mr. CRITTENDEN. For the proper understanding of the points in the case, it is necessary to call the attention of the court to the act of the 2d of March, 1831 (4 Stat., 472), which was before it at the last term in the case of the United States *v.* Briggs (9 Howard, 351), in which it was decided that the cutting or procuring to be cut, removing or procuring to be removed, or aiding, or assisting, or being employed in the cutting of all descriptions of timber trees on the public lands, is an indictable offense under the said act and punishable by fine and imprisonment.

No defence arising out of the passing of this act was pleaded either by way of abatement or specially.

The United States have the same right as any other proprietor to sue for trespasses on the public lands, and that right is not merged or lost by such trespasses having been made an offense punishable by indictment under the act of 1831. (Dugan *v.* United States, 3 Wheat., 181; United States *v.* Gear, 3 Howard, 121; Manro *v.* Almeida, 10 Wheat., 494; Cross *v.* Guthrie, 2 Root, Con. R., 90; Smith *v.* Weaver, 1 Taylor, 58; Blassingame *v.* Glaves, 6 B. Monroe, 38; Foster *v.* The Commonwealth, 8 Watts and Serg., 77.)

Mr. Justice Grier delivered the opinion of the court:

This is an action of trespass *quare clausum fregit* brought by the United States against Loftin Cotton, in which he is charged with cutting and carrying away a large number of pine and juniper trees from the lands of plaintiff.

On the trial below, the counsel for defendant requested the court to instruct the jury: First, "that the only remedy for the United States for cutting pine timber on the public lands was by indictment." Second, "that the United States have no common-law remedy for private wrongs." The refusal by the court to give these instructions is now alleged as error.

Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. It is true that in consequence of the peculiar distribution of the powers of government between the State and the United States, offenses against the latter, as a sovereign, are those only which are defined by statute, while what are called common-law offenses are the subjects of punishment only by the States and Territories within whose jurisdiction they are committed. But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the Constitution upon their sovereign powers can not affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan *v.* United States, 3 Wheat., 181, "it would be strange to deny them a right which is secured to every citizen of the United States." In the United States *v.* The Bank of the Metropolis, 15 Peters, 392, it was decided that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In the United States *v.* Gear, 3 Howard, 120, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.

Many trespasses are also public offenses by common law, or are made so by statute, but the punishment of the public offense is no bar to the remedy for the private injury. The fact, therefore, that the defendant in this case might have been punished by indictment as for a public offense is no defense against the present action. Whether, if he had actually been indicted and amerced for this trespass in a criminal prosecution in the name of the United States, such conviction and fine could be pleaded in bar to a civil action by the same plaintiff, is a question not before us in this case, and is therefore not decided.

The judgment of the district court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Florida, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed, with damages at the rate of six per centum per annum.

ACQUITTAL IN CRIMINAL SUIT NO BAR TO SUIT TO RECOVER THE VALUE OF TIMBER.

STONE *v.* UNITED STATES.

Circuit court of appeals, ninth circuit (64 Fed. Rep., 667).

JUDGMENT—RES JUDICATA—ACQUITTAL OF CRIMINAL CHARGE.

An acquittal of a person indicted for unlawfully and feloniously cutting and removing timber from public lands in violation of Rev. Stat., sec. 2461, is not a bar to an action by the United States against such person to recover the value of such timber as being wrongfully cut and converted. (Coffey *v.* U. S., 6 Sup. Ct., 437; 116 U. S., 442, distinguished.)

SAME—PROPER TEST.

A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first suit, if it had been given therein.

STRUCTURES WRONGFULLY PLACED ON PUBLIC LAND.

The mere continuance of a structure tortiously erected upon another's land, even after satisfaction of a judgment for such erection, is a trespass for which another action of trespass *qu. cl. fr.* will lie. (United States Digest, Vol. VI, p. 758, 1875; Russell *v.* Brown, 63 Me., 203.)

MEASURE OF DAMAGES.

E. H. BLY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES, DEFENDANT IN ERROR; B. F. HARTLEY ET AL., PLAINTIFFS IN ERROR, *v.* THE UNITED STATES, DEFENDANT IN ERROR; THE UNITED STATES *v.* DAY ET AL. (INDICTMENT).

Circuit court, Minnesota (4 Dill., 464).

In certain civil and criminal actions by the United States against trespassers upon its unsold timber land: *Held*, that the official plats and books in the office of the register of the United States Land Office are admissible as evidence on its behalf to show that the land on which the timber was cut had not been sold by the United States.

Parol evidence is not admissible on behalf of the defendants to show that the *locus in quo* was swamp land within the meaning of the swamp-land grant to the several States.

The cutting of timber upon the public lands is a criminal offense (Rev. Stat., sec. 2461), and the Government may proceed both civilly and criminally.

Where timber is cut upon the public lands willfully, fraudulently, or negligently, and without authority, and made into saw logs, the Government may replevy such logs, even when they have reached the boom, or, at its election, may sue in trover for their value, and in either case may recover without deduction for their enhanced value, after severance from the freehold, arising from the labor of the wrongdoer. In such case the Government is not confined to the "stumpage" value. (Nesbit *v.* St. Paul Lumber Company, 21 Minn., 491.)

Whether a different rule of damages would apply if the trespass were neither willful, fraudulent, nor negligent, *quære?*

CUTTING TIMBER UPON PUBLIC LANDS * * * —REMEDY OF GOVERNMENT—INDICTMENT—REPLEVIN—TROVER—MEASURE OF DAMAGES.

The Government has brought numerous civil suits in the nature of trover to recover the value of pine saw logs cut upon the public lands by the defendants or their vendors, and which, before the suits were commenced, had been rafted and brought down into the boom at Minneapolis, Brainerd, and other places. It has also caused the persons who cut the timber to be indicted. Certain questions of law arising in these cases were argued and decided, as shown in the opinion of the court.

DILLON, *C. J.:*

* * * * * * *

3. The cutting of timber upon the public lands is made a crime by the legislation of Congress, which may be prosecuted by indictment (Rev. Stat., sec. 2461), notwithstanding the provisions of section 4751. And the Government may proceed against trespassers upon its land, civilly or criminally, or both, at its election, and judgment in one form of remedy is no bar to the prosecution of the other remedy. The principle of the decision of Mr. Justice Miller in The United States *v.* McKee, ante, has no application to such a case.

It sues in these cases civilly, as the proprietor of the trees or timber which have been unlawfully cut and removed from its lands, to recover the value thereof. And it prosecutes the trespassers criminally in its sovereign capacity for a violation of its criminal statute in that behalf.

4. Where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the Government, or who has no reasonable ground to believe that it belongs to him or to some one under whom he claims, and such logs are by him hauled to the water course and rafted and taken to a distant boom, by means of which labor of the wrongdoer their value is much enhanced beyond their value when first severed from the freehold, the Government may replevy such logs in the boom, or may maintain an action in the nature of trover for their value, and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold by the labor of the wrongdoer. In such a case, the Government is not confined to what is called the "stumpage" value, but may recover the value of the logs in the boom.

As in such case the title of the Government to logs thus cut continues as against the wrongdoer and all persons (Town *v.* Dubois, 6 Wall., 548) until at least there has been some greater transformation of the original property than exists while it remains in the shape of logs, if the wrongdoer sells the logs to a person who has no actual notice that they were cut on the public lands, still the Government may maintain replevin against such vendee for the logs, if they are in existence, or if he has sawed them into lumber (which is a conversion of the logs), the Government may recover from him the value of such logs, when so manufactured into lumber, and is not confined to the "stumpage" value.

On this last proposition the authorities are conflicting, and we adopt and follow the decision of the supreme court of the State upon the point. (Nesbit *v.* St. Paul Lumber Company, 21 Minn., 491.)

The rule above laid down is the only one which will effectually protect the timber lands of the Government which are remote from settlements and in the wilderness. As against the willful or negligent trespasser the rule of damage indicated is not unjust, and as against his vendee it is perhaps the logical and necessary result of the property in the logs still remaining in the Government. At all events, it is the rule which has been approved by the supreme court of the State in the case before cited.

It may also be observed that the conclusions reached have a strong support in the adjudicated cases. (Silsbury *v.* McCoon, 3 Comst., 379; Riddle *v.* Driver, 12 Ala. (N. S.), 590; Betts *v.* Lee, 5 Johns., 348; Ellis *v.* Wire, 33 Ind., 127; Schulenburg *v.* Harriman, 2 Dillon, 398, 404.)

But there are cases which assert principles more or less in conflict with the cases just cited. (Moody *v.* Whitney, 38 Maine, 174; Single *v.* Schneider, 30 Wis., 570; Wetherbee *v.* Green, 22 Mich., 311—an instructive case.)

There is also a class of cases, English and American, which hold that where coal or mineral ore is taken by one person from the land of another the ordinary measure of damages in trespass or trover is the value of the coal or mineral when it first became a chattel, or was converted, and not the value of the coal or ore in place, or as it lay in the earth. The principal cases on this subject are cited and commented on in Barton Coal Company *v.* Cox, 39 Md., 1, S. C. 17, Am. Rep., 525; S. P. McLean Coal Company *v.* Long, Sup. Ct. Ill., Oct., 1876; *in re* United Merthyr Collieries Company, Law Rep., 15 Equity Cases, 46; S. C. 5 Eng. Rep. (Moak's ed.), 707.

The cases last referred to have generally arisen between adjoining owners, and the mitigated rule of damages which they lay down may have been adopted in consequence of the difficulty of ascertaining boundaries in subterranean mines, and it does not apply where the trespass is fraudulent or wilful or negligent. At all events, the doctrine of these cases should not be extended to cases of wilful or negligent trespasses upon the public timber lands of the Government.

If a private proprietor of timber lands used due precautions to ascertain his boundaries, and, by mistake of the surveyor, or without negligence or fault on his part or that of his servants, unintentionally cut on the adjoining lands of the Government, he, in good faith, supposing he was cutting on his own lands, and the Government neglected or delayed to bring trover until the logs thus cut were enhanced in value two or three hundredfold by the labor of bringing them to market, in such a case it may be that the court would be warranted in directing the jury to allow as damages the value of the logs when first severed, and interest on that value.

I am inclined to think the true doctrine of the measure of damages in trover is sufficiently flexible to allow this to be done when justice requires no greater recovery; but the cases now before the court do not require a judgment on the point, and I leave it open for further consideration, should it arise.

Nelson, J., concurs. Judgment accordingly.

O. A. DODGE ET AL.

(District court, Lewiston, Idaho, December term, 1886).

A preemptor who cuts or authorizes others to cut timber from his claim simply as a matter of converting the same into money, and not in good faith for the purpose of improving his claim and preparing it for cultivation, is a trespasser; if others purchase said timber they also are trespassers, and if they purchase knowing the facts they are wilful trespassers. The fact that the United States afterwards patents said lands to other persons does not relieve those committing the trespass from their liability for their wrongful act in cutting the timber. (See Land Office Report for 1887, p. 479.)

UNITED STATES *v.* JAMES A. SMITH.

(District court, eastern Arkansas, April term, 1882.)

In the case of the United States *v.* James A. Smith at the April term, 1882, of the United States district court for the eastern district of Arkansas, where it was charged that said Smith unlawfully cut and removed certain timber from lands belonging to the United States in the State of Arkansas and converted the same into cord wood and railroad ties, and where evidence was produced to show that he purchased said timber from parties who claimed to own the land upon which it stood, Judge Caldwell held as follows:

Persons cutting and removing timber from lands are bound to know that they who assumed to sell them the timber had the right to do so, and if they did not, the purchaser is liable to the lawful owner of the timber for its value, and if the trees are worked up into cord wood or railroad ties, such cord wood and ties are the property of the owner of the land as much as the trees were, and the owner of the land is entitled to recover the value of the timber in its new form; in other words, the value of the cord wood and railroad ties.

In a case reported as involving purchase of public timber from a wilful trespasser without reasonable inquiry on the part of the purchasers, suit ordered to recover the manufactured value of the logs, leaving it to the defendants to prove the innocence of their purchase, if such exists. (See letter from Attorney-General to the Secretary of the Interior, November 17, 1886, in the case of Spies and Martin, Michigan.)

The fact that the parties from whom purchase of public timber was made were irresponsible parties does not relieve the purchaser from responsibility in the matter, it being a fundamental principle of common law that when a person purchases from an irresponsible party he is bound to take proper precautions to satisfy himself that said party had the right to dispose of the article in question. (See Land Office Report for 1887, p. 470.)

In the matter of the claim of "innocent" purchasers "without notice of wrong," the stringent and oft-enforced regulations of the Department respecting public timber constitute sufficient "notice" in respect to the necessity of taking due precautions not to infringe upon public timber. Carelessness or indifference on the part of speculators purchasing can not serve as a shield to ward off the consequence of their actions. (See Land Office Report for 1887, p. 474.)

In purchasing timber, ignorance of the facts attending the procuring of the same or mistaken belief that all was right, is no sufficient defense for violating the statute which makes cutting and removing timber from public lands an offense irrespective of knowledge. (See Land Office Report for 1887, p. 473.)

EXEMPLARY DAMAGES.

The measure of damages for felling and carrying away trees from a tract of land is their value as they stood upon the land; and if their removal impaired the value of the land damages may be had for such in ury. (United States Digest, Vol. IX, p. 201 (1872); Ensley *v.* Nashville, 58 Tenn., 144.)

Punitive damages may be recovered in a civil action for a wrongful act, notwithstanding the act constitutes an offence punishable under the criminal statutes. (United States Digest, Vol. VII, p. 230 (1875); Ward *v.* Ward, 41 Iowa, 686.)

The public good in the restraint of others from wrongful doing, as well as the punishment of the offender, is to be considered in estimating exemplary damages. (Ib.)

Exemplary damages are not recoverable as matter of right. In awarding them the jury must be governed by the malice or wantonness of the defendant as shown by the conduct they find him liable for. (United States Digest, Vol. VII, p. 231 (1875); Boardman *v.* Goldsmith, 48 Vt., 403.)

Where wilfulness, fraud, malice, or oppression, evincing a disregard for the rights of others, characterize the wrongful act complained of, the jury are not limited in their verdict to the mere value of the property and interest, but may rightfully consider the circumstances of aggravation and increase the damages, so as to enforce a respect for the rights of others and as a punishment to the wilful trespasser. (United States Digest, Vol. VIII, p. 223 (1875); Storm *v.* Green, 51 Miss., 103.)

Where there is evidence from which the jury may find defendant acted maliciously in committing a trespass, they may give plaintiff punitive damages. (United States Digest, Vol. XIII, p. 874; Smith *v.* Thompson, 55 Md., 5; S. C., 39, Am. Rep., 409.)

The rule allowing exemplary or punitive damages applies where the wrongful acts of defendant are within the law for the punishment of crimes. (United States Digest, Vol. XIII, p. 244; Boetcher *v.* Staples, 27 Minn., 308; S. C., 38, Am. Rep., 295.)

WILLIS AND WIFE *v.* MILLER, TREASURER, ETC., AND OTHERS.

Circuit court, eastern district of Virginia, October, 1886 (29 Fed. Rep., 238).

DAMAGES. * * * MALICE.

Malice in law is not necessarily personal hate or ill will of the trespasser towards the person injured, but it is that state of mind which is reckless of law and of the legal rights of the citizens; and the object of exemplary damages or "smart money" is not only to indemnify the sufferer for any loss sustained, but to prevent similar actions on the part of the trespasser in the future.

BARRY *v.* EDMUNDS.

(116 U. S., 550.)

It is settled in this court that in an action for a trespass accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries if the *ad damnum* is properly laid.

UNITED STATES *v.* TAYLOR.

Circuit court, southern district of Alabama (35 Fed. Rep., 484).

PUBLIC LANDS—TRESPASS—RIGHT OF GOVERNMENT TO SUE—POSSESSION—HOMESTEAD.

Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the Government of possession or title so that it can not maintain an action of trespass for cutting timber on the land.

* * * * * * *

SAME—NOMINAL DAMAGES.

In such a case, merely entering on the land and cutting boxes or chipping trees, and removing therefrom crude turpentine, entitles plaintiff to nominal damages, though no actual damages were done.

SAME—COMPENSATORY DAMAGES.

In an action for cutting growing trees, if their value can be ascertained without reference to the value of the soil on which they stand, the measure of damages is the injury done them and not the difference in the value of the land before and after such injury.

SAME—EXEMPLARY DAMAGES.

In such a case the Government is entitled to exemplary damages, if the going on the land and cutting and chipping the trees, or dipping and removing the turpentine, was done by defendant wilfully, or if such acts were the result of a negligence so gross as to show wilfulness or a reckless indifference to the rights of the Government.

WOODEN-WARE CO. *v.* UNITED STATES.

(106 U. S., 432.)

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendants is: (1) Where he is a wilful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense. (2) Where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value. (3) Where he is a purchaser without notice of wrong from a wilful trespasser, the value at the time of such purchase.

Cases applying this rule of damages will be found in U. S. *v.* Williams, 18 Fed. Rep., 478; U. S. *v.* Heilner, 26 Fed. Rep., 82; U. S. *v.* Ordway, 30 Fed. Rep., 31; Aurora Hill, etc., Mine Co. *v.* Eighty-five Mine Co., 34 Fed. Rep., 521; Murphy *v.* Dunham, 38 Fed. Rep., 511; U. S. *v.* Scott, 39 Fed. Rep., 901; U. S. *v.* Wingate, 44 Fed. Rep., 129.

INSTRUCTIONS RELATIVE TO MEASURE OF DAMAGES.

The following circular relative to the rule of damages to be applied in cases of public timber trespass is based on the above-cited decision in the case of Wooden-Ware Company *v.* United States (106 U. S., 432):

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 1, 1883.

Special Timber Agents, General Land Office.

GENTLEMEN: Respecting the measure of damages to which the Government is entitled in settlement for timber trespass upon the public domain, the United States Supreme Court has recently decided that—

1. Where the trespasser is a knowing and wilful one, the full value of the property at the time and place of demand, with no deduction for labor and expense of the defendant, is the proper rule of damages.

2. Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such a trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vendee have added to its value, is the proper rule of damages.

3. Where a person or corporation is a purchaser without notice of wrong from a wilful trespasser, the value at the time of purchase should be the measure of damages.

You will, therefore, in cases where settlement is contemplated, state the facts and circumstances attending the cutting and the purchase of

the timber in such clear and definite manner that the Supreme Court decision above referred to can be readily applied.

In cases where settlement with an innocent purchaser of timber cut unintentionally, through inadvertence or mistake, is contemplated, you are instructed to report as nearly as possible the damage to the Government as measured by the value of the timber before cutting.

Very respectfully,

N. C. McFARLAND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 1, 1883.

Approved.

H. M. TELLER,
Secretary.

ISADORE COHN.

(20 L. D., 238.)

In the settlement of an unintentional timber trespass the value of the timber at the time of its taking, or if it has been converted into another form, its then value, less what the labor and expense of the trespasser have added thereto, is the proper rule of damages.

The fact that the trespasser in such case, in order to avoid prosecution, has offered a larger sum in settlement of the trespass than that required under the rule adopted by the Department is no reason why he should be held to such proposition, where it does not appear that he was acquainted with said rule. The sum incident to the survey of the land, under direction of the agent, together with the sum found to be due for the timber taken, is the amount he should be required to pay.

It is not an act of trespass for a homesteader to remove timber from his land in the preparation of the same for cultivation, nor should his vendee be held liable on a proposition of settlement therefor.

UNITED STATES *v.* MOCK.

Error to the circuit court of the United States for the northern district of California (149 U. S., 273).

When the defendant in an action of trespass brought by the United States against him for cutting and carrying away timber from public lands admits the doing of those acts, the plaintiffs are entitled to at least nominal damages in the absence of direct evidence as to the value of the standing trees.

It is not to be presumed in such case as matter of course that the Government permitted the trespass, and any instruction by the court pointing that way is error.

This action was commenced by the filing of a complaint on May 6, 1884, in the circuit court of the United States for the northern district of California, in which complaint it was alleged that the plaintiff was the owner, in 1879, of a certain tract of land in the county of Fresno, State of California, describing it, upon which tract of land were growing trees; that during that year the defendant unlawfully and wrong-

fully cut down and carried off certain of these trees, to wit, five hundred pine trees, and manufactured them into lumber, producing 1,500,000 feet of lumber, of the value of $15,000, for which sum judgment was asked. Defendant answered with a general denial.

The case was tried before a jury in April, 1888. On the trial it appeared from the testimony of defendant, as well as that of other witnesses, that in 1879 defendant had built a sawmill adjoining the tract and operated it for a little less than three months; that it had a capacity of about 10,000 feet, board measure, a day; that he had five white men and two or three Indians employed at the mill; that the timber was cut in the vicinity of the mill. The defendant also admitted that he knew that the tract described in the complaint was Government land, and that he did not at any time enter it as a homestead or preemption, and that a portion, though only a small portion, of the timber which he sawed was cut from that tract. There was the further testimony on the part of the Government of two timber agents, that after the commencement of this action they went upon the land and counted the number of stumps, and found 814 stumps of pine trees of the diameter of from 2 to 3 feet. There was also given in evidence an estimate of the amount of lumber that would be made from a tree of the size indicated by such stumps. There was evidence tending to show the price and value of lumber in that vicinity in the year 1879, but not the value of standing trees. In its instructions the court referred to the estimate made by the timber agents of the amount of lumber that would have been manufactured from the timber cut upon the premises, and the admission made by the defendant that he had cut some timber, stated that there was no testimony that he had cut all the timber that had been cut thereon, and that the jury had no right to guess, and that unless proof had been offered which created a reasonable certainty in their minds as to the amount of timber cut by the defendant and its value, the verdict must be for the defendant, and then proceeded as follows:

There are two elements entering into these cases. This is an action of trespass, a tort. It is wrong for one person to go on another person's land and cut and remove timber without the consent of the owner; so the going of any person on the public domain and cutting and removing from it timber without the consent of the Government is wrong, just as much as if I went on any of your ranches or vineyards, cut and removed the crops without your consent. But there is a vast difference in the character and quality of actions. A gentleman may permit the public to use a portion of his domain as a highway for years, and as long as it is being done with his tacit consent nobody would be held a trespasser for doing so; but when he notifies the public that it must cease then that tacit right ceases, and anybody who went on there might be justly held as a trespasser. The history of the country in regard to trespassing on the public domain and cutting timber for the use of the people in building their homes upon their farms and for general domestic purposes may be considered. As I observed, the Government is the proprietor of the soil. It has always owned the soil and the timber on it and the mines beneath it; but it is a matter of common knowledge in this country that the country could not have been settled up otherwise than by the practice and custom which has grown up in advance of legislation.

It is a matter of history that the Government permitted the early pioneers as they went ahead to make their homes for themselves to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with the knowledge of every department of the Government—legislative, judicial, and executive. The earliest law that was passed that I remember was in 1831, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for shipbuilding. It is possible that there was other legislation following that, but I do not remember any until 1878, and during all that time every department of the Government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts. In this case, in order to judge wisely and fairly of this defendant, as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were wilful and wanton trespassers in the sense in which a trespass is wilful and wanton unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all. If this party was a wilful trespasser, and cut from the public domain this timber wantonly and maliciously, the Government is entitled to recover from him the full value of the timber by him so cut and removed from the public domain, without allowing at all for the increased value that he put upon it; for it will not be permitted that a man shall trespass on your property and commit waste and wanton destruction by removing it, that you shall be merely indemnified for the original value; in other words, you may recover your property and its value wherever you find it, whether the man has added to its value since he got it or not. This case is somewhat different from the case yesterday. This case presents this naked fact: That if you return a verdict for the Government, it must be for the value of the lumber manufactured. Now, no evidence had been offered in the case showing the market value of the trees or if they had any market value one way or the other. There is no evidence in the case to warrant you in concluding that the trees had any market value in 1879 or at any other time. The only evidence offered by the Government is as to the value of the timber after it was cut and made into lumber, and in that way this case differs from the case yesterday. Yesterday I instructed you in that case that if you find that although there was a trespass, that it was not wilful, you might determine the value of the timber as it stood on the ground. In this case there is no evidence of that kind.

The jury found a verdict for the defendant, and the Government has brought the case here on error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court:

The only errors alleged are in the charge. The specific portions to which the attention of the court was called at the time and exceptions taken are that which refers to the history of the attitude of the Government toward pioneers and others who took timber from Government lands for domestic use and that which declared that no verdict could be returned in favor of the Government except for the value of the lumber manufactured. In these there was obvious error. Although there was no direct evidence of the value of the standing trees, yet it

did appear that they were manufactured into lumber and that the lumber had commanded a price of from eight to nine dollars a thousand feet, and when the Government proved or defendant admitted that he cut and carried away some of the timber on this tract the Government was entitled to at least a verdict for nominal damages. As to any further right of recovery, see Wooden-ware Co. *v.* United States, 106 U. S., 432; Benson Mining Company *v.* Alta Mining Company, 145 U. S., 428.

Nor were the observations of the court in reference to the attitude of the Government justifiable. Whatever propriety there might be in such a reference in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement of his own land, or development of his own mine (and in respect to that matter, as it is not before us, we express no opinion), there certainly was none in suggesting that the attitude of the Government upheld or countenanced a party in going into the business of cutting and carrying off the timber from Government land, manufacturing it into lumber, and selling it for a profit; and that was this case. There is no pretense that the defendant cut timber for his own use; he says himself he sold it all. He ran a sawmill, cut timber, manufactured it into lumber, and made profit out of the sale of the lumber. There is nothing in the legislation of Congress or the history of the Government which carries with it an approval of such appropriations of Government property as that.

The judgment must be reversed and a new trial ordered.

See, also, United States *v.* Humphries, 149 U. S., 277.

BERRY *v.* FLETCHER ET AL.

Circuit court, western district of Missouri (1 Dill., 67).

All who instigate, promote, or cooperate in the commission of a trespass, or aid, abet, or encourage its commission, are guilty.

* * * * * * *

Where the defendants are sued jointly in trespass, the jury must find a single verdict, and assess damages jointly against such as are proved guilty of the *same* trespass.

In trespass against several, the jury should estimate damages according to the most culpable of the joint trespassers.

All damages are referred by the law either to compensation or punishment. Compensation is to make the party injured whole. Exemplary damages are given, not to compensate the plaintiff, but to punish the defendant.

UNITED STATES *v.* BAXTER ET AL.

Circuit court, district of Washington, northern division (46 Fed. Rep., 350).

* * * * * * *

TRESPASS—BURDEN OF PROOF—DAMAGES.

In an action of trespass by the United States for cutting timber on Government land, the burden of showing that the timber was cut by mistake, with a view of mitigating the damages, is upon the defendants; and in the absence of evidence to that effect, there is no error in permitting the Government to recover the value of the saw logs when already brought to the water.

TRESPASS—PARTNERSHIP.

Where such a trespass is committed by a firm, one partner can not show that as to him it was done through mistake, though his partner may not have been mistaken, and ask that one judgment for damages be rendered against him and a different one against his partner, since his holding the fruits of the tort after being notified of the mistake is a ratification of his partner's act.

JOINT TRESPASSERS.

LOVEJOY *v.* MURRAY.

(3 Wall., 1.)

* * * * * * *

A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar.

AMERICAN BELL TELEPHONE CO. *v.* ALBRIGHT.

Circuit court, district of New Jersey (32 Fed. Rep., 287).

JUDGMENT—JOINT TRESPASSER—BAR OF RECOVERY.

A judgment against one joint trespasser or wrongdoer, without satisfaction, is no bar to a recovery against the others.

In event of wilful trespass committed by one member of a firm his copartners are responsible for his acts on behalf of the firm from which they receive the benefits or profits. (See Land Office Reports for 1887, p. 473.)

ENFORCING JUDGMENT.

DEPARTMENT OF JUSTICE,
Washington, January 21, 1887.

SIR: I am in receipt of your letter of December 21, with its inclosures, relative to timber trespass by R. D. Byrne and J. McDavid, doing business at Bluffsprings, Fla., up to 1884.

Pursuant to your request the United States attorney for northern Florida has been instructed * * * to bring civil suit for the manufactured value of the lumber, with a view to enforcing judgment against the defendants whenever the opportunity is afforded by their probable accumulation of property hereafter. * * *

Very respectfully,

A. H. GARLAND,
Attorney-General.

The SECRETARY OF THE INTERIOR.

SETTLEMENT IN CASES OF PUBLIC TIMBER TRESPASS.

COMPROMISE.

[Section 3469, U. S. R. S.]

Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws.

DISTINCTION BETWEEN SETTLEMENT AND COMPROMISE.

[5 L. D., 240.]

A claim of the Government arising from timber depredations is for an unascertained amount which the Secretary of the Interior may properly find and determine and effect settlement for with the trespasser by receiving payment in full.

The amount of such a claim having been duly ascertained and fixed, there is no authority in the Department to compromise the same by receiving in payment therefor a less sum than the amount found to be due.

Secretary Lamar to the Secretary of the Treasury, November 15, 1886.

I am in receipt of a communication from the Solicitor of the Treasury of May 13, 1886, relating to the question of the authority of this Department to compromise and settle timber depredation cases, referring to the opinion of the Attorney-General submitted January 8, 1880, upon this subject.

In his communication (with reference to this opinion) the Solicitor of the Treasury says: "I am informed that since the date of this letter from the Attorney-General, a copy of which was furnished your Department about the time it was received, all applications for compromise of claims in favor of the United States arising from trespasses have been considered and disposed of as provided for in section 3469, Revised Statutes" (excepting certain cases therein referred to). Then referring to the regulations issued by the Commissioner of the General Land Office authorizing special agents to receive and consider propositions to settle claims in favor of the United States arising from trespass where the same were not wilfully committed, says: "I know of no authority by which an executive officer can compromise and settle a claim in favor of the United States, except that conferred by sections 295, 409, 3229, and 3469, Revised Statutes." He brings the subject to my attention with a view of securing some uniform action. To this end I submitted the communication to the Commissioner of the General Land Office for report, which is now before me, a copy of which I also transmit herewith.

The Commissioner of the General Land Office, doubting the authority of that office or of this Department to settle and compromise such cases, recommends that the practice heretofore followed of entertaining propositions in that office and this Department for settlement of timber trespasses be discontinued.

While I concur fully in the opinion of the Solicitor of the Treasury that there is no authority by which an executive officer can compromise a claim in favor of the United States, except that conferred by section 3469, I do not consider said section as a restriction upon the authority of any executive officer to settle a claim in favor of the United States where such settlement is not the result of a compromise, but a settlement in full payment of the entire amount due the Government on such claim and where such settlement is made by the Department having control and jurisdiction of the subject-matter.

The authority conferred by section 3469 is alone necessary to be considered in the investigation of this subject. That section provides that "upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be *compromised*, and recommending that it be *compromised* upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to *compromise* such claim accordingly. But the provision of this section shall not apply to any claim arising under the postal laws."

After a careful consideration of the question of authority of an executive officer to compromise a claim in favor of the United States, except as provided for by the section above quoted, and of the character of claims arising from timber depredations and the authority to settle the same as exercised by this Department, I have been unable to concur with the views of the Solicitor of the Treasury or the recommendation of the Commissioner of the General Land Office that no proposition for the settlement of timber depredation claims should in the future be entertained by this Department, or that the settlement of such claims effected through it is the exercise of a doubtful authority.

It seems to me apparent that the difference of opinion as to the authority of this Department to settle timber depredation claims arises from the use of the words "compromise" and "settlement" in the same sense, or else the impression must prevail that the settlement of such claim, as now authorized and executed by this Department, is a settlement made upon a compromise of a specific amount found to be due.

Speaking of the regulations issued by the Commissioner and addressed to special agents, the Solicitor of the Treasury says that such regulations "contemplate that they may receive and consider propositions to settle claims in favor of the United States arising from trespass where the same were not wilfully committed," and adds: "I know of no authority by which an executive officer can compromise and settle a claim in

favor of the United States except that conferred by sections 295, 409, 3229, and 3469, Revised Statutes." If it is intended by this that no authority exists in this Department to settle a claim upon a compromise of the amount found to be due, I concur in that view; but if it is intended that there is no authority in this Department to ascertain and determine what amount is due, and to settle such claim by receiving the full amount so found to be due, I do not concur.

A compromise implies a mutual concession or an agreement to receive in payment a less sum than the amount found to be due, and it is in this sense that the term is employed in section 3469. I do not understand that the settlement of such claims as authorized by this Department is a settlement of that character.

The general power and authority conferred upon this Department respecting public lands includes the duty and authority to protect from depredation the timber thereon, and to seize what is cut and taken away from them wherever it may be found. It follows that in the exercise of that power and duty this Department has full authority to ascertain and determine under the law the extent of such depredation, the value of the timber cut and destroyed, the character of the trespass, and when the amount of the claim has been ascertained to receive payment of the full amount of such claim in satisfaction thereof. (Wells *v.* Nickles, 104 U. S., 447; Wooden Ware Company *v.* United States, 106 U. S., 432.)

In the execution of this power and duty special agents have been appointed, who are directed to investigate and report upon all cases of timber trespass, and to receive propositions for settlement of the same. The instructions issued to special agents require the trespasser to submit with his proposition for settlement a sworn statement showing the character of the trespass, the amount of the timber, its value when standing in the tree, when felled and cut into logs, when delivered at the landing, when delivered at the mill, when manufactured into lumber, and its value in its position and condition when purchased by the party in whose possession it was found.

In respect to the character of the trespass, the Supreme Court, in the case of Wooden Ware Company *v.* The United States, *supra*, have announced certain rules which have been embraced in the instructions to special agents. Under the sworn statement so furnished, and the rules adopted for their guidance, the special agents investigate and report upon the claim, by which means the amount due the Government is officially ascertained and determined. A claim due the Government arising from timber depredations is a claim for an unascertained amount, which the Secretary of the Interior, through the officers and agents of this Department, finds and determines. A settlement made with the trespasser by receiving payment of the amount so found to be due is in no sense a compromise, but payment in full of the claim due to the Government; and I can see no reason for invoking

the action of the judicial department to ascertain and determine that which the executive department in the scope of its authority has already determined, or to enforce payment by suit when the trespasser offers to discharge his liability without suit.

The special agents may report the character of the trespass, the amount and the value, or either of these facts, different from that shown by the sworn statement of the trespasser; as, for instance, the trespasser may claim that he is an innocent purchaser from an unintentional trespasser, and may offer to pay the value of the timber at the time when taken. The special agent may report that the trespass was wilful, of which the purchaser had notice, and may recommend settlement at the full value of the property at the time and place of demand. Upon further investigation by the special agent or upon examination by the Commissioner or the Secretary, it may be determined that the purchase was made without notice of wrong, but from a wilful trespasser, and that the timber should be settled for at the value of the property at the time of purchase, to which the trespasser may agree and settle. While the amount paid may be greater than the amount originally offered and less than the amount originally reported by the Government officials, it is not a compromise of the claim, but a determination from the facts of the case of the amount due the Government.

If after that amount has been ascertained the trespasser either declines to pay or is unable to pay it, but offers a less amount, there is no authority in this Department to compromise the claim, but the future control of the case should be left with the Department of Justice.

This question was incidentally passed upon by the Solicitor-General, acting as Attorney-General, in his letter of August 23 last, addressed to this Department, relative to the seizure of timber taken from the public lands, from which I infer that the Department of Justice concurs in the view herein expressed; but as this question was not directly involved in the matter referred to I do not feel at liberty to claim it as authority for this opinion.

Being satisfied that this Department not only has authority, but that it is its duty to take jurisdiction of and to settle all such cases in the manner herein stated, I have for this reason so fully presented the matter for your consideration, with the request that if you should not agree in this opinion you will concur in submitting the matter to the Attorney-General for his opinion thereon.

WELLS *v.* NICKLES.

(104 U. S., 444.)

While no act of Congress expressly authorizes the Secretary of the Interior or other officer of the Land Department to appoint timber agents, the appropriation of money by Congress to pay them is a recognition of the validity of their appointment.

Where the instructions of the Commissioner of the General Land Office directed the agents to seize and sell timber cut on the public lands, and also authorized them to compromise with the trespasser on his paying a reasonable compensation for the timber cut and taken away, *Held*, That a compromise so made by which he pays all the costs and expenses of the seizure, and gives bond to pay for the timber when its value shall be ascertained, pursuant to the agreement, is binding on the United States.

This compromise, should, in violation of its terms, the property be seized and sold by such agents, is evidence of his title and right of possession in his action against their vendee for the recovery of the property.

SETTLEMENT FOR TRESPASS UNDER ACT OF JUNE 3, 1878 (20 STAT., 89).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

* * * * * * *

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

The provisions of this act are extended to all the public-land States by the act of August 4, 1892 (27 Stat., 348).

PAYMENT OF $2.50 PER ACRE, UNDER SECTION 5 OF THE ACT OF JUNE 3, 1878 (20 STAT., 89), ONLY RELIEVES FROM CRIMINAL LIABILITY.

UNITED STATES *v.* SCOTT ET AL.

Circuit court, northern district of California (39 Fed. Rep., 900).

PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.

A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of $2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of 1878 (1 Supp. Rev. Stat., p. 329, sec. 5); he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

SETTLEMENT OF TRESPASS BY PURCHASE OF THE LAND TRESPASSED UPON.

[Act of June 15, 1880; 21 Stat., 237.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any lands of the United States shall have been entered and the Government price paid therefor in full no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said lands, and no civil suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim or for agricultural or domestic purposes or for maintaining improvements upon the land of any bona fide settler or for or on account of any timber or material taken or used by any person without fault or knowledge of the trespass or for or on account of any timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for the same or for or on account of any alleged conspiracy in relation thereto: *Provided*, That the provisions of this section shall apply only to trespasses and acts done or committed and conspiracies entered into prior to March first, eighteen hundred and seventy-nine: *And provided further*, That defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment and shall pay all costs accrued up the time of such entry.

SEC. 2. That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the Government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the Government upon said lands

shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

SEC. 3. That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty-one, by reason of the grant of alternate sections for railroad purposes is hereby reduced to one dollar and twenty-five cents per acre.

SEC. 4. This act shall not apply to any of the mineral lands of the United States; and no person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands after March first, eighteen hundred and seventy-nine, shall be entitled to the benefit thereof.

SALE OF PUBLIC TIMBER.

Public timber unlawfully cut may be disposed of by public sale after advertisement, or by private sale, either with or without previous advertisement. (See Department of Justice to Secretary of the Interior, August 23, 1886, p. 41).

Advertising must be by consent of Secretary of Interior. (See Rev. Stat., 1878, sec. 3828.)

DISPOSITION OF MONEYS COLLECTED FOR DEPREDATIONS UPON PUBLIC LANDS.

MOIETY.

SEC. 4751. All penalties and forfeitures incurred under the provisions of sections twenty-four hundred and sixty-one, twenty-four hundred and sixty-two, and twenty-four hundred and sixty-three, Title "The Public Lands," shall be sued for, recovered, distributed, and accounted for, under the directions of the Secretary of the Navy, and shall be paid over, one-half to the informers, if any, or captors, where seized, and the other half to the Secretary of the Navy for the use of the Navy pension fund; and the Secretary is authorized to mitigate, in whole or in part, on such terms and conditions as he deems proper, by an order in writing, any fine, penalty, or forfeiture so incurred.

[Act of April 30, 1878; 20 Stat., 46.]

* * * * * * *

SEC. 2. * * * *Provided*, That all moneys heretofore, and that shall hereafter be, collected for depredations upon the public lands shall be covered in the Treasury of the United States as other moneys received from the sale of public lands: *And provided further*, That where wood and timber lands in the Territories of the United States are not surveyed and offered for sale in proper subdivisions, convenient of access, no money herein appropriated shall be used to collect any charge for wood or timber cut on the public lands in the Territories of

the United States for the use of actual settlers in the Territories and not for export from the Territories of the United States where the timber grew: *And provided further*, That if any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found.

TIMBER LANDS IN THE STATES OF CALIFORNIA, OREGON, NEVADA, AND IN WASHINGTON TERRITORY.

[Chapter 151; approved June 3, 1878; 20 Stat., 89.]

* * * * * * *

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

The act of August 4, 1892 (27 Stat., 348), extends the provisions of this act to all the public-land States.

MOIETY CLAUSE OF SECTION 4751, U. S. R. S., MODIFIED AND PARTLY REPEALED.

[17 Op., p. 592.]

The provisions in section 2 of the act of April 30, 1878, chapter 76, requiring moneys collected for depredations upon the public lands to be covered into the Treasury, in effect modifies section 4751, Revised Statutes, only as to that part of the penalties, etc., recovered which was payable under the latter section to the Secretary of the Navy; it does not affect the part payable thereunder to informers.

Section 5 of the act of June 3, 1878, chapter 151, applies to the Pacific States and Washington Territory, and repeals section 4751, Revised Statutes, only so far as concerns such States and Territory.

DEPARTMENT OF JUSTICE, *July 19, 1883.*

SIR: Yours of the 16th instant incloses a note addressed to yourself from the United States attorney for eastern Michigan, which informs you that certain fines under section 2461, Revised Statutes, are now in the registry of the district court for his district, and that he supposes them to be *distributable* under your direction (to the informer, etc.) under section 4751.

You also inclose certain letters upon the same subject from the files of your Department (dated September 12, 1879, September 3, 1880, and October 14, 1880), in the course of which the Solicitor of the Treasury intimates a doubt whether section 4751 has not been in effect repealed by the act of April 30, 1878 (chap. 76, sec. 2), such doubt being, as he says, somewhat affected by the circumstance that this section was subsequently (act of June 3, 1878, chap. 151, sec. 5) expressly repealed *as to certain States only.*

Upon the whole matter you ask how far your powers under section 4751 have been modified by subsequent legislation, the practical question being that as to *distribution*, presented above, in eastern Michigan.

As my attention has not been called to any subsequent legislation other than the acts of 1878 cited in your letter, I will confine what I have to say to their operation only.

Section 4751 makes a three-fold provision as to its subject-matter, i. e., *depredations* upon timber standing upon the public lands: (1) Suits therefor shall be under the direction of the Secretary of the Navy; (2) one-half of any penalties, etc., recovered shall be paid to informers and the other half to the Secretary of the Navy, and (3) the Secretary is authorized to mitigate penalties, etc., so incurred.

Thereupon the act of April, 1878, provided "that all moneys heretofore and that shall hereafter be collected for depredations upon the public lands shall be covered into the Treasury of the United States as other moneys received from the sale of public lands" (Supp. Rev. Stat., 316), and the act of June 3, 1878 (Supp. Rev. Stat., 328)—the main purport of which was to provide for the *sale* of the public timber lands in the Pacific States and Washington Territory—after repeating the provision just quoted for all sales so to be made, goes on immediately thereafter to expressly repeal section 4751 so far as concerns such States and Territories.

Referring to the *three-fold operation of* section 4751 above mentioned, it is plain that it is not *repealed* by the act of April, 1878. For instance, this latter enactment does not touch the powers of the Secretary as regards the superintendence of suits or the mitigation of penalties. The opinion of the Attorney-General of February 17, 1882, referred to by you, goes upon this view, although it is one only *incidental* to the point which he there discusses.

I am now asked in effect how far this act modifies the provision designated above as "(2)."

In my judgment it applies only to that part of the penalty which is *payable to the Secretary.*

Since the year 1831, when the provisions of section 4751 were first enacted, it has become the general policy of the United States to require that all moneys collected in behalf of the United States shall be paid into the Treasury (Rev. Stat., sec. 3617). Some exceptions thereto, not depending upon any special reason, which here and there had escaped

attention, are gradually disappearing. I regard the provision of the above act of 1878 merely as putting an end to one of these exceptions.

This is the more evident from the circumstance that it operates expressly upon all collections *theretofore* as well as upon those *thereafter*. As the legislature could not have meant to disturb the informer's rights in the former cases—at all events in many of them—it appears that they were not *advertent*, or therefore *referring*, to such rights *in any case*.

So that what is meant is, that so much of such money as is collected for the *United States shall be* paid *into the Treasury*, and not, as theretofore, to *the Secretary*. The emphasis is upon *the disposal*, not the *proportion* of certain moneyed interests of the United States.

That this is the true interpretation appears also from a corresponding passage in the act of June, 1878, where, although section 4751 is expressly *repealed*, yet express provision (*ex abundanti*) is added as to the payment *into the Treasury* of the proceeds of the sales therein ordered; as if it had not been enough to repeal the provision which gave what had been, to a certain extent, the equivalents of such proceeds *to the Secretary*, but were necessary also to direct expressly that the proceeds themselves shall follow the general direction of public moneys.

The two acts of 1878, therefore, have their distinct operations, that of April applying to the whole country, and merely directing that whatever moneys vest in the United States under section 4751 shall thereafter be paid into the Treasury, that of June applying to certain localities only, and for them entirely annulling section 4751, adding also a proviso that any moneys which might arise from the methods therein devised as substitutes for those referred to in section 4751 should (in like manner) be paid *into the Treasury*.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

MOIETY CLAUSE OF SECTION 4751, U. S. R. S., REPEALED AS REGARDS ALL PUBLIC-LAND STATES.

DEPARTMENT OF JUSTICE,
Washington, D. C., May 9, 1895.

SIR: Replying, as promised by my letter to you of the 15th ultimo, to your inquiries concerning the proper construction of section 2461, R. S. U. S., relating to timber trespass on public lands, and section 4751, R. S., relative to the moiety allowed to informers, as affected by the act of June 3, 1878 (20 Stat., 89; 1 Supp. R. S., p. 169), relating to public lands in California, Oregon, Nevada, and Washington Territory, providing for settlement of prosecutions and repealing said section 4751, and as affected by the act of August 4, 1892 (27 Stat., 348),

making general as to all public-land States the said act of 1878, I will say that I perceive no reason for doubting that prosecutions in Wisconsin under said section 2461 are covered by the provision of the act of 1878 (as amended by said act of 1892) in regard to settlement of prosecutions for the sum of $2.50 per acre. As relates to informers, I am of the opinion that said section 4751 is repealed as to all the "public-land States," which, of course, includes Wisconsin. If you, or any informer, desire decisive settlement of these points, you may institute a test case in order to bring them before the court.

Respectfully,

RICHARD OLNEY,
Attorney-General.

Mr. H. E. BRIGGS,
United States Attorney, Madison, Wis.

SEIZURE.

TIMBER UNLAWFULLY CUT ON PUBLIC LANDS.

[18 Op., 434.]

The Land Department has authority to make seizure, through its officers or agents, of timber unlawfully cut on the public lands.

Timber unlawfully cut on the public lands, which has been seized by duly authorized agents of the Land Department and is in their custody, may be disposed of by that Department; and whether this be done by public or private sale, with or without previous advertisement, is a matter entirely discretionary therewith.

DEPARTMENT OF JUSTICE,
August 23, 1886.

SIR: By your letter to the Attorney-General of the 14th ultimo attention is called to a communication received by you from the Commissioner of the General Land Office, a copy of which was transmitted therewith, touching the disposition of a large quantity of timber alleged to have been unlawfully cut on the public lands in Montana Territory and which has recently been seized as the property of the United States under instructions from that office, and the question presented for consideration is, Whether the Commissioner may "direct the sale of the property so seized; and, if so, whether it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community, without advertising the same?" Having carefully examined this subject, I now beg to submit the following in reply:

The question proposed seems to involve a preliminary inquiry, namely, as to the authority of the officers of the Land Department to make seizure of timber unlawfully cut on the public lands. Upon this point I entertain no doubt.

Congress has provided a remedy for the protection of the timber on

the public lands by imposing certain penalties and forfeitures (see sec. 2461 and 2462, Rev. Stat.; also, sec. 3 of the act of June 3, 1878, chap. 150, and sec. 4 of the act of June 3, 1878, chap. 151), which can only be enforced by indictment or information; and by section 2 of the act of April 30, 1878, chapter 76, it is further provided "that if any timber cut on the public lands shall be *exported from the Territories* of the United States it shall be liable to seizure by United States authority wherever found."

But these statutory remedies are not the only ones available to the Government. In Cotton *v.* United States (11 How., 229) it was held that the United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. Agreeably to the doctrine of that case the United States may resort to the same civil remedies for the protection of their property which are open to any other proprietor. Thus they may seize the timber cut, arrest it by replevin, or recover damages in trespass for the taking and conversion (United States *v.* Cook, 19 Wall., 594). These are the ordinary remedies given by the common law for the recovery of personal property or its value. Seizure or recaption (which is one of them) is a remedy by the mere act of the party injured, and may be resorted to for the recovery of such property where its exertion will not endanger the public peace. (3 Black. Com., 4.)

Authority to exert this remedy in behalf of the United States must be deemed to belong to the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, as a power included in the general duties respecting the public lands which are devolved upon him (sec. 453, Rev. Stat.). Such authority, indeed, has long been asserted and frequently exercised by the Land Department through its officers or agents, the latter acting under instructions issued by the Commissioner, with the sanction of the Secretary. Referring to this, the Supreme Court, in Wells *v.* Nickles (104 U. S., 447), observes:

> The Department of the Interior, under the idea of protecting from depredation timber on the lands of the Government has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this the registers and receivers of the Land Office have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority to do this was necessary, it may be fairly inferred from appropriations made to pay the services of these special timber agents.

In that case a compromise by timber agents with a trespasser respecting the disposition of timber cut by him on the public lands and seized by such agents, which was made in conformity to instructions of the Commissioner of the General Land Office, was held to be valid. This amounts to an affirmation of the authority of the Commissioner, through those agents, to act for the United States in matters connected with timber depredations on the public domain, and I think it safe to say

that under such authority the remedy by recaption or seizure, as well as any other of the before-mentioned common-law remedies, may be resorted to for the recovery of timber unlawfully cut on the public lands, according to the circumstances of the case. While I entertain no doubt as to the existence of the remedy by seizure, yet its liability to abuse and to become an instrument of oppression demand that it should be used with judicious discretion and only in clear or emergent cases, and except in such cases the regular procedure of the courts should be preferred.

As to the authority of the Commissioner to dispose of such timber by public or private sale, where the same has been seized by duly authorized agents of the Land Department and remains in their custody, I apprehend that this power exists, subject to the general supervision or direction of the Secretary of the Interior. There being no statutory provision covering a case of that kind, or regulating the disposition of the property, it must be regarded as a subject left to the Land Department to be dealt with in such manner as in the judgment of that Department will best protect the interests of the Government. As the property is perishable in its nature, and its custody may involve expense, it is not only within the power but it is the duty of the Department, for the avoidance of loss to the Government, to convert the same into money; and whether this be done by public or private sale is a matter entirely discretionary with it. While ordinarily the public interests (which are always to be kept in view) will be best subserved by a public sale after advertisement, yet I perceive no objection, legal or other, to a private sale either with or without previous advertisement, where the mode of disposal is advantageous to the Government, but as a general rule public sale should be had.

In direct response to the question presented by you, I therefore submit that, in my opinion, the Commissioner may direct the sale of the property seized, and that "it may be disposed of at private sale, and in such way as may be both to the advantage of the Government and to the benefit of the community without advertising the same."

I am, sir, very respectfully,

G. A. JENKS,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

WELLS *v.* NICKLES.

(104 U. S., 444.)

While no act of Congress expressly authorizes the Secretary of the Interior or other officer of the Land Department to appoint timber agents, the appropriation of money by Congress to pay them is a recognition of the validity of their appointment.

Where the instructions of the Commissioner of the General Land Office directed the agents to seize and sell timber cut on the public lands, and also authorized them to compromise with the trespasser on his paying a reasonable compensation for the timber cut and taken away: *Held*, That a compromise so made by which he pays all the costs and expenses of the seizure, and gives bond to pay for the timber when its value shall be ascertained, pursuant to the agreement, is binding on the United States.

This compromise, should, in violation of its terms, the property be seized and sold by such agents, is evidence of his title and right of possession in his action against their vendee for the recovery of the property.

[Act of April 30, 1878; 20 Stat., 46.]

SEC. 2. * * * *And provided further*, That if any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found.

THOMAS STEPHENSON *v.* WILLIAM L. P. LITTLE AND OTHERS.

Supreme court of Michigan (10 Mich. Rep., 433).

* * * * * * *

The General Government has all the common-law rights of an individual in respect to depredations committed upon the public lands, and the Commissioner of the General Land Office—being the proper executive department to enforce those rights—in the absence of legislation by Congress on the subject—may lawfully direct the seizure and sale by the local land officers, on behalf of the Government, of timber cut by trespassers on the public lands.

The party guilty of a fraudulent admixture of saw logs owned by himself with those owned by another, so that it is impossible any longer to identify his own, loses all interest in them, and is remediless if such other person appropriate the whole mass to his own use. Per Manning, jr., Christiancy, J., concurring. Campbell, J., dissented, holding that where the evidence showed the logs to be of a uniform value per thousand feet the person who had intermingled them was entitled to reclaim from the common mass an equivalent to his own logs. Martin, Ch. J., gave no opinion on this question.

Per Martin, Ch. J.: The person whose property another has fraudulently admixed with his own has the right to take possession of the whole mass for the purpose of separating and securing, or of disposing of, the portion belonging to himself; and if it can not be separated, and he advertise and sell his interest in the whole, he does not thereby render himself liable to the other for the conversion of his property. He has at the very least, as respects the property so commingled, the rights of a tenant in common.

NORRIS ET AL. *v.* UNITED STATES.

Circuit court, western district of Louisiana (44 Fed. Rep., 735).

ACTION FOR TIMBER CUT ON PUBLIC LAND—BURDEN OF PROOF.

Where in an action by the United States to recover the value of logs cut on public land the plaintiff's evidence shows that the defendant purchased from the trespasser and converted to his own use a large number of logs, among which were some of those cut from the public land, the burden is on the defendant to show that all the logs so bought by him were not so cut.

CONFUSION OF GOODS.

Where the logs so cut were mixed in the river with a large quantity of other logs, so that the identical logs could not be conveniently separated, the United States thereby acquired a proportionate interest in the entire mass of logs, under Rev. Civil Code La., art. 528, which provides that "when a thing has been formed by a mixture of materials belonging to different proprietors, * * * if the materials can not be separated without inconvenience, their owners acquire in common the *pro rata* of the thing."

TIMBER UNLAWFULLY CUT ON INDIAN LANDS.

[19 Op., p. 710.]

Where a large quantity of standing timber (about 4,000,000 feet) was unlawfully cut by trespassers on the Fond du Lac Indian Reservation, in Minnesota, and left lying thereon—the land from which the timber was cut being held in common by the Indian bands for whom it was reserved by the ordinary Indian title: Advised, (1) that the United States have the absolute ownership of the timber thus cut; (2) that the Indians have no interest therein whatever, and that it in no way appertains to the Indian Bureau or its agents to assume charge thereof; (3) that such timber may be sold for and on account of the United States, but that sale should be made by the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. Opinion of Acting Attorney-General Jenks of August 23, 1886 (18 Op., 434), concurred in. (See p. 41.)

See United States *v.* Cook (19 Wall., 591), cited on page 47.

See, also, "Timber on Indian allotments and Indian reservations" (19 Op., p. 232), cited on page 96.

SAWMILLS ON PUBLIC LANDS.

[Acting Commissioner of General Land Office to Secretary of the Interior, March 2, 1886, in case of public-timber trespass by Robert H. Longwell, Colorado.]

* * * I have to state that I am not aware of any statute expressly authorizing the seizure and sale of sawmills erected on the public domain by timber depredators or intruders thereon, but I am of the opinion that the title to such mills should be held to be in the United States under the principle of common law which gives to the owner of real estate all houses, fixtures, and other improvements placed thereon by strangers without the knowledge and consent of such owner. The depredator in this case had no color of right or title to the land nor license to go upon the same, and the mill was erected thereon without authority. As soon as the material was attached to the land it became a part of the realty, and the title passed to the Government. (See Sedgwick and Tait on Trial of Titles to Land, pp. 361, 690, and Gerald Real Estate, p. 107.)

I would suggest, as the United States attorney expresses doubt as to whether the mill can be seized prior to the termination of the suit for the trespass, that the parties be restrained by injunction from removing the mill and appurtenances from the land pending the determination of the suit for damages.

See Erhardt *v.* Boaro and others, cited on page 49.

CUT TIMBER

NOT A PART OF THE REALTY.

SCHULENBERG ET AL. *v.* HARRIMAN.

(21 Wall., 44.)

* * * * * * *

Where the title to land remains in the State, timber cut upon the land belongs to the State. Whilst the timber is standing it constitutes a part of the realty; being severed from the soil, its character is changed; it becomes personalty, but its title is not affected; it continues as previously the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property.

Where logs cut from the lands of the State without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the State is entitled, under the law of Minnesota, to replevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case held to be just in its operation and less severe than that which the common law would authorize.

HUTCHINS ET AL. *v.* KING.

(1 Wall., 53.)

Growing timber constitutes a portion of the realty, and is embraced by a mortgage of the land. When it is severed from the freehold without the consent of the mortgagee, his right to hold it as a portion of his security is not impaired.

When the amount due according to the stipulation of the mortgage is paid, the lien of the mortgage upon the timber thus severed is discharged, and the property reverts to the mortgagor, or any vendee of the mortgagor. Any sale of the timber by the mortgagee, or assignee of the mortgagee, after such payment is a conversion for which an action will lie by the mortgagor or his vendee.

D. cut and piled posts on lands belonging to the State. While he was thus engaged R. purchased the land, and afterwards replevied the posts, some of which were cut before and some after the purchase. *Held*, that R. had no title to those cut prior to his purchase. (United States Digest, Vol. II, p. 590 (1869); Rogers *v.* Bates, 1 Mich. (N. P.), 93.)

The sale of standing timber is a sale of an interest in real estate, and a subsequent purchaser by warranty deed of the land with notice of such sale can not maintain trespass against the prior purchaser of the timber for cutting and removing the timber. (United States Digest, Vol. VII, p. 839; Russell *v.* Meyers, 32 Mich., 522.)

THE RIGHT TO SUE FOR THE VALUE OF CUT TIMBER AFTER PATENT.

[Land Office Report for 1889, p. 287.]

The rights acquired by a claimant under the homestead law * * * invest the claimant with no legal title to the land, or any portion of the *realty*, such as the timber. Hence, until title to the land is passed by

patent, the Government is empowered to indemnify itself for any portion of the realty improperly alienated.

Whenever, however, patent issues, the title thereby acquired, as far as concerns remedies for damages in connection with the land, is regarded as relating back to the date of actual settlement, and right is thereby acquired by the claimant at the date of issuance of patent, but not earlier, to seek recovery of damages subsequent to the date of settlement.

Since cut timber is not a part of the realty and does not go with the land, I will further add that all unlawful cutting or removing of timber from public land prior to the date of such settlement constitutes a trespass against the United States, which is not affected by the subsequent passing of title to the land by patent.

USE OF CUT TIMBER BY VIRTUE OF A RIGHT OF OCCUPANCY.

UNITED STATES *v.* COOK.

(19 Wall., 591.)

Timber standing on lands occupied by the Indians can not be cut by them for the purposes of sale alone, though when it is in their possession, having been cut for the purpose of *improving* the land, that is to say, better adapting it to convenient occupation; in other words, when the timber has been cut incidentally to the improvement, and not cut for the purpose of getting and selling it, there is no restriction on the sale of it.

The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title it is incumbent on him to show that the timber was rightfully severed from the land.

The United States may maintain an action for unlawfully cutting and carrying away timber from the public lands.

* * * * * * *

The Chief Justice delivered the opinion of the court:

We think the action was properly brought, and that it may be maintained.

The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was so decided by this court as early as 1823 in Johnson *v.* McIntosh.* The authority of that case has never been doubted.† The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy.‡ The possession when abandoned by the Indians attaches itself to the fee without further grant.§

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* 8 Wheaton, 574.

† 1 Kent, 257; Worcester *v.* Georgia, 6 Peters, 580.

‡ Cherokee Nation *v.* Georgia, 5 Peters, 48.

§ Ib., 17.

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land. In theory, at least, the land is better and more valuable with the timber off than with it on. It has been *improved* by the removal. If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber when cut become the absolute property of the United States.

These are familiar principles in this country and well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more.

In this case it is not pretended that the timber from which the saw logs were made was cut for the purpose of improving the land. It was not taken from any portion of the land which was occupied, or, so far as appears, intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else. Under such circumstances, when cut, it became the property of the United States absolutely, discharged of any rights of the Indians therein. The cutting was waste, and in accordance with well-settled principles the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion.

The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber. Every purchaser from them is charged with notice of this presumption. To maintain his title under his purchase it is incumbent on the purchaser to show that the timber was rightfully severed from the land.

That the United States may maintain an action for cutting and

carrying away timber from the public lands was decided in Cotton *v.* United States.* The principles recognized in that case are decisive of the right to maintain this action.

The answer of the court, therefore, to the question propounded by the circuit court, is in the affirmative.

See 19 Op., 710, cited on page 45.

See also 19 Op., 232, cited on page 96.

INJUNCTION.

ERHARDT *v.* BOARO AND OTHERS.

Appeal from the circuit court of the United States for the district of Colorado (113 U. S., 537).

Mr. Justice Field delivered the opinion of the court:

* * * It is now a common practice in cases were irremedial mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. (Jerome *v.* Ross, 7 Johns., ch. 315, 332; Le Roy *v.* Wright, 4 Sawyer, 530, 535.)

NICHOLS *v.* JONES AND ANOTHER.

Circuit court northern district of Alabama (19 Fed. Rep., 855).

INJUNCTION.

Injunctions are granted to prevent trespasses as well as to stay waste where the mischief would be irreparable, and to prevent a multiplicity of suits.

WILSON AND OTHERS *v.* ROCKWELL AND OTHERS.

Circuit court district of Colorado (29 Fed. Rep., 674).

INJUNCTION—TRESPASS—TITLE.

A party showing an equitable title to realty will be protected against trespassers by injunction, though the location of the legal title has not been finally determined.

THEODORE LE ROY *v.* GEORGE WRIGHT ET AL.

Circuit court northern district of California (4 Sawyer, 530).

* * * * * * *

COURTS OF EQUITY WILL NOT INTERFERE.

Courts of equity will not ordinarily interfere to injoin the commission of a threatened trespass to real property unless the trespass be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coal, and the like. The jurisdiction of the court in such cases is asserted for the preservation of the property pending proceedings at law for the determination of the title.

* 11 Howard, 229.

UNITED STATES *v.* GEAR.

(3 Howard, 120.)

* * * * * * *

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.

INJUNCTION TO STAY WASTE.

An injunction to stay waste is allowed as a matter of course. (United States Digest, Vol. I, p. 401 (1863); Markham *v.* Howell, 33 Ga., 508.)

Mines, quarries, and timber are protected by injunction, upon the ground that injuries and depredations upon them are or may cause irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners. In such cases the plaintiff's right need not be first established at law. (United States Digest, Vol. III, p. 359 (1871); West Point Iron Co. *v.* Reymert, 45 N. Y., 703.)

The unlawful quarrying and removal of stone wherein consists the chief value of land may be restrained by injunction. (United States Digest, Vol. XVI, p. 347; Althen *v.* Kelly, 32 Minn., 280.)

Entry on land and digging up and removing fruit trees thereon is waste which may be enjoined. (United States Digest, Vol. XVI, p. 347; Silva *v.* Garcia, 65 Cal., 591.)

An injunction will be granted to stay waste threatened or being committed. (United States Digest, Vol. XVII, 337; Sheridan *v.* McMullin, 12 Oreg., 150.)

INSTITUTION OF CIVIL PROCEEDINGS.

No civil proceedings in connection with timber trespasses on public lands should be instituted in the name of the United States without instructions from the proper authority. See the following letter and the subjoined regulations of the Solicitor of the Treasury referred to therein:

DEPARTMENT OF JUSTICE,
Washington, D. C., September 16, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, in which you request that reply may be made to certain inquiries contained in a letter of the Acting Commissioner of the General Land Office (a copy whereof you inclose) in regard to the institution of civil proceedings in timber trespass cases by United States district attorneys in the various States and Territories without recommendation from the Department of the Interior or instructions from this Department.

(1) Considering the several inquiries in their order, I beg to state that I was not aware, until informed by the said letter of the Acting Commissioner, of his office having received information to that effect, that United States attorneys, or any United States attorney, had instituted civil actions for timber trespass without the recommendation or instructions referred to. By the first paragraph of the regulations made by the Solicitor of the Treasury, with the approbation of the Attorney-General, for the observance of United States attorneys and marshals, which

regulations are embodied in the pamphlet of "Instructions to United States Marshals, Attorneys, Clerks, and Commissioners," issued by the Attorney-General July 1, 1895, it is provided that, except in extraordinary cases of emergency, no United States attorney will commence or defend a civil suit or proceeding in court, in the name or for the benefit of the United States, without instructions from the office of the Solicitor of the Treasury, or by direction of the Attorney-General, or some person or court authorized by law so to direct. This provision is found upon pages 52 and 53 of said pamphlet, a copy of which I have the honor to hand you herewith.

(2) Should civil action be commenced by a United States attorney, in disregard of said regulation, it would not, in my opinion, render the action void, or jeopardize the interests of the United States involved therein, but would constitute merely a violation of a departmental regulation, and not a violation of law.

(3) It is not now, and so far as I have been able to ascertain, it has not been the practice of this Department to direct the institution of civil proceedings in timber trespass cases, except upon the recommendation of the Department of the Interior.

Respectfully,

JUDSON HARMON, *Attorney-General.*

The SECRETARY OF THE INTERIOR.

REGULATIONS OF THE SOLICITOR OF THE TREASURY.

The following are regulations prescribed by the Solicitor of the Treasury under authority of sections 377 and 379, Revised Statutes, which must be fully and carefully complied with:

1. No United States attorney will commence or defend a civil suit or proceeding in court, in the name or for the benefit of the United States, without instructions from this office or by direction of the Attorney-General or some person or court authorized by law so to direct, except in extraordinary cases, where some material interest of the United States would, in his opinion, be lost or endangered by delay; and in such cases, he will immediately report his action with his reasons therefor.

2. Whenever a United States attorney shall receive from a public officer, or shall in any other manner become possessed of information which shall lead him to believe that a trespass upon the property of the United States, or an infraction of its revenue or other laws, has been committed, he will immediately report such information to this office, with his opinion as to the propriety of instituting suit; or, in case the remedy of the United States would, in his opinion, be lost or endangered by delay, he may immediately commence a suit, and report the same, with his reasons for such proceeding.

TIMBER ON MINERAL LANDS.

Mineral lands are those which are more valuable for the mineral therein (except coal) than for agricultural purposes or for the timber thereon.

The right to take timber from mineral lands for building, agricultural, mining, or other domestic purposes is specially provided for by the following act of Congress.

[Act of June 3, 1878, Chap. 150; 20 Stat., 88.]

AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado,

or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 5, 1886.

RULES AND REGULATIONS.

By virtue of the power vested in the Secretary of the Interior by the first section of the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations are hereby prescribed:

1. The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and other mineral districts of the United States not specially provided for.

2. The land from which timber is felled or removed under the provisions of the act must be known to be of a strictly mineral character

and that it is "not subject to entry under existing laws of the United States, except for mineral entry."

3. No person not a citizen or bona fide resident of a State, Territory, or other mineral district, provided for in said act, is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and bona fide residents of the State and Territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purposes mentioned in said act.

4. Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use and for the purposes aforesaid.

5. The books, files, and records of all mill men or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this Department.

6. Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes, within the State or Territory where it grew.

All cutting of such timber for use outside of the State or Territory where the same is cut, and all removals thereof outside of the State or Territory where it is cut, are forbidden.

7. No person will be permitted to fell or remove any growing trees of any kind whatsoever less than eight inches in diameter.

8. Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used, and must cut and remove the tops and brush, or dispose of the same in such manner as to prevent the spread of forest fires. The act under which these rules and regulations were prescribed provides as follows:

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior,

shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

9. These rules and regulations shall take effect September 1, 1886, and all existing rules and regulations heretofore prescribed under said act inconsistent herewith are hereby revoked.

WM. A. J. SPARKS,
Commissioner.

Approved August 5, 1886.

L. Q. C. LAMAR, *Secretary.*

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 19, 1887.

To Registers and Receivers,
and Special Timber Agents.

GENTLEMEN: Section 7 of regulations of August 5, 1886, prescribed under the act of June 3, 1878, to wit: "7. No person will be permitted to fell or remove any growing trees of any kind whatsoever less than eight inches in diameter," will not be regarded as applicable to black or "lodge pole" pine growing in separate bodies upon mineral lands.

Very respectfully,

S. M. STOCKSLAGER,
Acting Commissioner.

Approved to take effect the 1st day of June, 1887.

L. Q. C. LAMAR, *Secretary.*

FORCE AND EFFECT OF RULES AND REGULATIONS BY THE SECRETARY OF THE INTERIOR UNDER THE ACT OF JUNE 3, 1878 (20 STAT., 88).

(*a*) The rules and regulations as to the cutting of timber upon the public lands of the United States prescribed by the Secretary of the Interior under laws, United States, Forty-fifth Congress, second session, chapter 150, will be considered such an act of the executive department of the United States as the courts will take judicial notice of under Revised Statutes, Montana, division 1, section 625; and it is not necessary to set out such rules in a complaint seeking to recover for an infringement thereof.

(*b*) Said law is constitutional, and the rules and regulations of the Secretary of the Interior made thereunder are not unconstitutional as trenching upon the domain of the legislative department of the Government.

(*c*) In the absence of any statutory license in the matter, the cutting

of timber less than 8 inches in diameter constitutes a trespass. (See Land Office Report for 1887, p. 479, case of United States *v.* Williams and another, supreme court of Montana, January 26, 1887. Judge McLeary.)

At the September term, 1886, of United States district court, Boise City, Idaho, Judge Broderick presiding, four Chinamen (Wing Ling, Ah Sin, et al.) were convicted of timber trespass on the public mineral lands for failing to utilize all of each tree cut that could profitably be used, and to take precautions to guard against the spread of forest fires as required by Department regulations under the act of June 3, 1878. (Circular, August 5, 1886, section 8; see Land Office Report for 1887, p. 480.)

UNITED STATES *v.* REDER.

District court, South Dakota (69 Fed. Rep., 965).

PUBLIC LANDS—CUTTING TIMBER FROM MINERAL LANDS—INDICTMENT.

On the trial of an indictment for cutting timber from the mineral lands of the United States for purposes other than those connected with building, agricultural, mining, or other domestic uses contrary to the act of June 3, 1878, the intent is wholly immaterial, and it is only necessary to show that the prohibited acts were done.

SAME—REGULATIONS BY SECRETARY OF THE INTERIOR.

One who cuts and removes timber from the mineral lands of the United States and sells the same, or the lumber manufactured therefrom, without taking from the purchaser any statement in writing as to the purposes for which the same is intended to be used, as required by the regulations made by the Secretary of the Interior under the authority of the act of June 3, 1878, is guilty of a violation of that statute and subject to the penalties prescribed by it.

UNITED STATES *v.* MADISON A. TIPTON.

United States circuit court, South Dakota, western division.

INSTRUCTIONS OF THE COURT, FEBRUARY 18, 1896.

Hon. A. D. THOMAS, *Presiding Judge:*

It is charged in the indictment that Madison A. Tipton committed the offense set forth on the 3d day of August, 1894, in Pennington County.

I wish, in the first place, to advise you that the date alleged in the indictment, the 3d day of August, 1894, is not material when you come to consider the proof. When you come to the proof, it is not necessary to show that the offense, if any was committed, was in fact committed on that particular day alleged in the indictment. The indictment was found and filed in this court the 25th of September, 1895, and if you find that an offense was in fact committed, and committed within three years prior to that time, to wit, the 25th day of September, 1895, that answers the purpose of the statute and the rule of law.

In order that you may definitely understand the issues which you have to find—which you have to determine—I will read the indictment,

or that portion which is material. It is charged that "Madison A. Tipton, late of Pennington County, in said district, on the 3d day of August, 1894, at Pennington County, unlawfully did cut, cause, and procure to be cut a large amount of timber, to wit, a large number of pine trees then and there growing and being on the public lands of the United States, the said trees then and there being and growing in one of the public-land districts of the United States of America, to wit, the State of South Dakota, with the intent then and there to export the same from the State of South Dakota, and with the intent then and there to dispose of the same contrary to the form, force, and effect of the statutes of the United States in such case provided, and contrary to the rules and regulations in pursuance thereof made by the Secretary of the Interior."

You will notice that the gist of the offense charged is the intent; that is, the gist of the offense is that he cut, caused, and procured to be cut timber, as charged, with the intent, first, to export it out of the State of South Dakota, and, second, to dispose of it contrary to the statute and the rules prescribed by the Secretary of the Interior.

To this indictment the defendant has interposed the plea of not guilty, and by that plea has put the prosecution to the proof of all the material allegations of the indictment with that degree of certainty required in all criminal cases.

The indictment seems to have been drawn under section 4, chapter 151, found in the Supplement of the Statutes of the United States, and reads as follows, or that portion which is material for us at present:

"That after the passage of this act" (that was June, 1878) "it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any of the lands of the United States in said States and Territories" (and I would say that this law, by another law, is made applicable to the State of South Dakota. Understand me, this law which I now read is made applicable to this State by law of Congress), "or remove, or cause to be removed, any timber from said public lands with intent to export or dispose of the same." And then provides for punishment and conviction.

The charge in this indictment is cutting, causing and procuring to be cut, with the intent stated in the indictment.

Now, it has been shown by the evidence on the part of the Government that these lands from which the timber was alleged to have been taken and cut, or rather cut, were mineral lands of the United States, and therefore it is proper for me to read you another law, which must be taken in connection with the statute which I have just read. That is the law of June 3, 1878, found in 20 Statutes at Large, 88, chapter 150:

"That all citizens of the United States and other persons bona fide residents of the States of Colorado," etc. (including Dakota), "and all other mineral districts of the United States shall be, and are hereby, authorized and permitted to fell and remove for building, agricultural,

mining, or other domestic purposes any timber or other trees growing or being upon the public lands, said lands being mineral and not subject to entry under existing laws of the United States except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

It is provided in section 3 of the act which I have just read as follows:

"Any person or persons who shall violate the provisions of this act or any rules and regulations in pursuance thereof made by the Secretary of the Interior shall be deemed guilty of a misdemeanor," and upon conviction shall be punished as prescribed in that statute.

The law is that it is competent for the Congress of the United States to provide in this class of cases as well as others, and it has been the constant practice of Congress to provide that the head of the Department, in this case the Secretary of the Interior, shall make rules and regulations for the proper carrying out of the law, the proper execution of it, provide various details, and when the rules and regulations of the head of the Department, in this case the Secretary of the Interior, are made pursuant to the law they have the force and effect of law, become a part of the law.

While from section 4, which I first read, it would be a violation of the statute to cut or cause to be cut timber with the intention to export or dispose of the same, the law I just read—that, is the mineral law so called—permits certain persons to cut and remove timber from the mineral lands under certain conditions. It is necessary to remember what those conditions are. In other words, under section 4, which I first read, it is an offense to cut and remove timber, as you have heard there, with the intent to export or dispose of it contrary to the statute, contrary to the law which you have heard there. Now, the Government has granted a license to certain parties on certain conditions to cut timber and procure it to be cut upon the mineral lands of the United States, as in the statute I have read to you.

You will have to remember and consider whether this timber, if caused or procured to be cut, was cut under the regulations prescribed by this statute, and in accordance with certain rules of the Secretary of the Interior, to which I will call your attention.

First, who are the persons that may cut? Citizens of the United States, and other persons, bona fide residents of the State of South Dakota. They are authorized and permitted to fell and remove, for what? For building, for agricultural, for mining, or other domestic purposes. If upon the mineral lands of the United States, as therein designated, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth, and for other purposes.

The Government owns these lands; it owned them at the time stated in the indictment, and it had a right to provide that no person should go upon those lands and cut or procure to be cut any timber for any purpose. It had a right to do that; but it saw fit to grant a license to certain persons under certain conditions by which timber might be cut, or some portion of it, as you have heard. The Government giving that license had a right to prescribe the conditions under which persons could exercise that license. Therefore it has, as you have heard, prescribed certain conditions designated in the statute, and it is therein provided that cutting, removing, etc., must be subject to the rules and regulations prescribed by the Secretary of the Interior.

Now, the Secretary of the Interior has prescribed certain rules. Two of those rules I will read and call your attention to. The courts and juries take judicial notice of those rules. They need not be proven as a part of the evidence. We take notice of them as of the law when made pursuant to the authority of Congress. I advise you these rules are made by the Secretary of the Interior pursuant to an act of Congress.

The first is rule 3: "No person not a citizen or bona fide resident of a State, Territory, or other mineral district provided for in said act is permitted to fell or remove timber from mineral lands therein." (No person not a citizen or bona fide resident of the State.) "And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and bona fide residents of the State and Territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purposes mentioned in said act," namely, for building, mining, agriculture, or other domestic purposes.

Rule 4: "Every owner or manager of a sawmill or other person felling or removing timber under the provisions of this act shall keep a record of all timber so cut and removed, stating time when cut, names of parties cutting the same, or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purposes for which sold; and shall not sell or dispose of such timber or lumber made from such timber without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use, and for the purposes aforesaid."

Now, you have noticed as I have read to you and called your attention to the statute, that by section 3 "any person or persons who shall

violate the provisions of this act, or any rules and regulations in pursuance thereof, made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor," and punished as provided by law. As I said to you, the gist of the crime charged, the gist of the offense alleged, is the intent with which it was done, if at all, by the defendant. The question whether he intended to violate the law or not is not material. The question is, Did he cut, or cause or procure to be cut, timber with the intent to export or dispose of it contrary to law, as I have read it to you. That is the gist of the question. He had no right to cut for speculative purposes. If he cut at all it must be in accordance with the law and license of the Government.

That is a question for you to determine. Did the defendant cut, or cause or procure to be cut, timber on the mineral lands? Naturally, did he cut it himself, or cause it to be cut, or procure it to be cut? This is one question of fact that on the very threshold, from the evidence of this action, you will have to determine.

In this case, as generally, it is not practicable, or possible, often, to get direct evidence of an ultimate fact. Perhaps nobody saw the act done. So the jury, in this class of cases, as you do in your various affairs of life, draw inferences and conclusions—such conclusions and inferences as you think ought to be drawn from all the facts and circumstances established to your satisfaction. Take the evidence that you had before you; when you become satisfied, if you do, that it is true and reliable, draw such inferences as to whether or not this defendant cut or caused or procured somebody else to cut this timber for the purposes that he was manufacturing it, if you find he was manufacturing any timber; then the fair and reasonable inference. Draw such inferences as you think ought to be drawn.

If you find from the evidence that he cut, caused or procured to be cut timber, then you come to the main question, With what intent did he cut it? Now, it is impossible to get into the human mind for the purpose of seeing the workings of the mind. If we could obtain access to it we would know but little about it. You must get at the intent in this case, as you do in every case of the kind—from the acts, from the circumstances that surround the matter—and then draw such conclusions as you think ought to be drawn from the facts and circumstances established to your satisfaction; draw such conclusions as to what the intent was. Because it is a lawsuit and because you have taken upon yourselves the oaths of jurors you do not surrender your common sense, your good judgment, your reasoning powers. You carry them into the jury box and everywhere you go; in your jury box, as in your various business relations of life, you are to use them and appropriate the evidence and draw such inferences and conclusions as your good judgment dictates to be drawn from the facts and circumstances.

The first question involved in this indictment is, Did the defendant cut, or cause or procure to be cut, timber upon the mineral lands of the United States, in the county of Pennington, this State, with intent to

export it from and out of the State of South Dakota? There are really, you might say, two offenses charged. The question has been raised on that subject, and there is a bill to be submitted to you. That is first for you to determine, Did he cut, or cause or procure to be cut, timber, and, if so, did he do so with intent to export it from the State of South Dakota?

There is no law which permits any person to do that. No person can go upon the public lands, mineral or otherwise, under conditions certainly that apply to this case, so far as we are concerned in the investigation of this matter, and cut and remove timber for the purpose of exporting from the State; certainly not on the mineral lands under the statute which I have read. If you find that he did so cut, cause or procure to be cut, timber with that intent, then you are at liberty to find the defendant guilty. If you come to the conclusion or fail to find that the Government has established that proposition beyond reasonable doubt, then you should pass that question, because unless you so find you can not convict him of the alleged offense.

Then you turn your attention to the other question which is involved in that indictment. Did he cut any timber, cause or procure it to be cut on the lands, as therein described, with the intent to dispose of it contrary to the statute and rules as laid down and which I have given you?

I am of the opinion in this case, and so charge you, that it is incumbent upon the prosecution to satisfy you by evidence beyond a reasonable doubt that the defendant did cut, cause or procure to be cut, timber from the mineral lands, as charged in the indictment, with intent to dispose of the same contrary to the statute and the rules prescribed by the Secretary of the Interior; that the burden in this case rests upon the prosecution.

Now, has the Government satisfied you, because it is incumbent upon it to do so, that the defendant cut, or caused or procured to be cut, timber from the lands described in the indictment for purposes other than for building, mining, agricultural, or other domestic purposes? As I understand, the Government has assumed that responsibility and maintains it in this case—claims that the responsibility rests upon it, as I understand from the officers.

You will look this evidence all over and examine it with care. Something has been said about a Black Hills jury. From what I have seen of the men who come to the Black Hills—I have had some experience with them for many long years—I believe, and have so stated many a time, that a case will receive the same careful, honest, and intelligent consideration from them that it would receive from any other part of the State. I dismiss that question. I assume that you feel the same responsibility to do your duty as the court must feel to do his.

Now, you will look this case over, consider it from all the different standpoints, view this evidence, consider and weigh and scrutinize it

with care, and reach just such a conclusion as your good judgment dictates. It is for you, under the rules given by the court, to ascertain what the truth is, and when you have ascertained it it is your duty to bring it to light by your verdict.

The Government of the United States comes in here like anybody else. It has no right that the humblest citizen has not, but it, as well as the defendant, is entitled to your good, honest, intelligent judgment.

It is claimed by the prosecution from the evidence that this defendant was manufacturing, and for the purpose of selling lumber to a railroad company; that the defendant was engaged in that business. You take all the subsequent facts as you find them from the evidence; consider them all. For the purpose of getting at the intent you may consider what a man did before and after, to enable you to get at the intent with which he did the act, if at all. The law provides that a railroad company has a right "to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad."

"Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road," upon the public lands of the United States.

It would not be a violation of the law of the statute for a party to dispose of the timber cut upon the public domain to a railroad company for the purpose named. Now, in order to get at the intent you may consider this matter, whether or not he was selling, or had sold or disposed of in any manner, or was about to sell any lumber to a railroad company for purposes of construction as a road. He would have no right to sell, and the railroad company would have no right to buy, for the purpose of repairs, but for the purpose of construction they have the right. And if a party cut timber from the public lands with the intent to dispose of it to the railroad company for purposes of construction only, that would not be a violation of the law; but with the intent to dispose of it for other purposes than that to be used by the railroad company for other purposes except for construction, it would be a violation.

You take these acts of the defendant after and before for the purpose of coming at the intent with which he cut, or caused or procured to be cut, the timber, if you find he did so, and to that extent you have a right to consider the evidence.

This defendant, in standing on trial in this case, as every defendant in this court, is presumed to be innocent until his guilt is established by the prosecution beyond reasonable doubt. He is permitted to take the stand in his behalf if he chooses to, but is not obliged to, and the fact that he does not take the stand does not militate against him.

The Government is to establish its case by competent proof, and it must be done before any jury can convict him.

Now a reasonable doubt. What is a reasonable doubt? We judges and juries have sometimes had a wrong conception of a reasonable doubt. Judges have many times attempted to define a "reasonable doubt," but it always seems to me that the construction, definition of reasonable doubt was more blind than the terms themselves. I can see nothing obscure in the term. It simply means a reasonable doubt and not an unreasonable doubt. It is a doubt based on evidence or want of evidence in the case. It is not some imaginary doubt, and we can not in the nature of things by human testimony reduce matters to mathematical certainty. We have to deal with reasonable doubt; not imaginary doubt. If after a careful, intelligent comparison and consideration of the entire evidence you would say and feel right in saying that you would not hesitate to act upon it in the most serious affairs of life, then you have no reasonable doubt. If you would so hesitate you have a reasonable doubt.

The questions of fact are for your consideration. You are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony, and you must consider and determine whether the witnesses have told or intended to tell the truth upon the stand and what their testimony weighs, how much it weighs in enabling you to get at the truth, because that is the purpose of all the evidence, all the law that can be given, to get at the truth so far as the issues are concerned.

If you find the defendant guilty you will say, "We find the defendant guilty as charged in the indictment." If you find him not guilty you will say "Not guilty" by your verdict. In order to relieve you of the trouble of writing out the whole form, both forms will be handed to you by the deputy and you are to use the form in accordance with your verdict.

In regard to selling to the railroad company for purposes of construction, I charge you to mind the statute. The railroad company have a right to take, and I charge you that this defendant would have a right to cut and sell to the railroad company, from the lands adjacent to the line of the railroad, material, earth, stone, and timber necessary for the construction of said railroad; not to be shipped off somewhere else, but adjacent to that line.

NORTHERN PACIFIC RAILROAD COMPANY *v.* LEWIS.

(162 U. S., 366.)

In the above case the United States Supreme Court held as follows:

A person who, without authority, cuts wood from public lands of the United States, not mineral, or purchases such wood so cut, and leaves it, when cut or purchased, upon such public lands near a railroad, has no right or possession of, or title to, or ownership in it, and cannot maintain an action against the corporation owning such railroad for its destruction by fire caused by sparks from locomotives of the company. (See syllabus.)

It also further held therein as follows: If the right to cut is claimed under the act of June 3, 1878 (20 Stat., 88), the burden of proof is on the party so claiming to show the mineral character of the land and his compliance with the rules and regulations of the Secretary of the Interior. "The right to cut is exceptional, and quite narrow, and for specified purposes only. The broad, general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute the facts should have been shown by them. The presumption, in the absence of evidence, is that the cutting is illegal." (U. S. *v.* Cook, 19 Wall., 591.)

UNITED STATES *v.* MILO J. LEGG ET AL.

District court, fourth judicial district, Montana.

INSTRUCTIONS OF COURT.

You are instructed that in a civil action, such as the one at bar, the plaintiffs are only required to prove the material allegations of the complaint, and the issues raised by the pleadings by a preponderance of evidence.

In this Territory the public lands of the United States are divided into three general classes, namely, agricultural lands, coal lands, and mineral lands.

1. Agricultural lands are those lands that are capable of being brought under a state of cultivation for the production of grain, grass, or vegetable of any kind that may be grown in this climate, and which are not known to contain any valuable deposits of coal or any of the precious metals such as gold, silver, lead, cinnabar, or other valuable minerals.

2. Coal lands are those lands which are chiefly valuable for the coal known to exist therein.

3. Mineral lands are those lands which are chiefly valuable for the minerals (except coal) which they contain, and which are more valuable for the minerals therein contained than they are as agricultural lands or for the timber growing thereon. Mineral lands are not subject to entry under the general land laws of the United States, but can only be located and entered as mines and mining claims under the act of May 12, 1872. Upon such lands persons who are citizens and residents of the United States and the Territory may cut and remove therefrom the trees and timber growing thereon for domestic, agricultural, or mining purposes. But this right to cut timber from mineral lands does not give any right to persons to go upon the public coal lands or agricultural lands of the United States and cut and carry away the timber thereon.

4. The authority granted by the act of June 3, 1878, to cut timber applies exclusively to lands which are strictly mineral in character and

subject to mineral entry only. The defendant must prove by a preponderance of evidence that such lands are more valuable for the mineral than for any other purpose and that they are not suitable for agricultural purposes or cultivation or valuable solely for the timber thereon.

5. In this case the burden of proving the character of the land from which this timber was cut or taken by the defendants rests upon the defendants, and unless the defendants have proven by a preponderance of the evidence on that point that the land from which this timber was cut and taken is mineral land and subject to entry only as mineral lands, then they can not justify their entry on said land and the cutting and carrying away of said timber.

6. If you believe from the evidence that the defendants took into their possession and sawed up into lumber and sold any logs which had been previously cut by other persons and had been seized by the United States, and which were still held by the United States, and that the defendants then took them and converted them to their own use, then it is no defense to this action whether said logs were lying on mineral lands or not when they were taken by the defendants and converted to their own use.

7. The court instructs you that if the defendants knowingly went upon the public lands of the United States and cut and carried away and converted to their own use any of the trees and timber growing thereon and sawed the same into lumber and sold it and kept the money therefor, then you should find for the United States the full value of the lumber so cut and sold by the defendants, unless you further find from the evidence that the timber was cut and taken from mineral lands.

8. If you find from the evidence that the defendants were mistaken and unintentional trespassers on the public lands of the United States, and that by mistake they unlawfully cut timber from said lands, not knowing said lands were public lands, then you may find for the United States the full value of the growing trees and the old logs taken by the defendants, unless you also find that the growing trees so found by you to have been cut by the defendants were cut from mineral lands as defined in other instructions, then, in that event, you will find for the United States the value of the old logs only.

9. If you find that the defendants knowingly went upon the public lands and cut and carried away this timber, and that said lands were not by them (defendants) known to be mineral, as defined in these instructions, then you will find for the United States the full market value of the lumber after it had been sawed up by the defendants and the value of the logs in the mill yard that had not been sawed into lumber.

10. The court instructs you that any and all statements made by any of the counsel in this case in reference to what they expected to prove by said record of the United States against Broadwater, Hubbel & Co.

is not evidence in this cause and should not be considered by you in making up your verdict.

(Given at defendants' request:)

If the jury believe, from a preponderance of the evidence in this cause, that the paper offered in evidence by the plaintiff has been altered or changed since it was signed by the defendants, then such paper would not be the paper originally signed by the defendants and the jury have a right to exclude such paper from their consideration.

(Given at defendants' request:)

The burden of showing that the trespass was committed (if any is proven) on the lands of the United States, and not otherwise, by the preponderance of the evidence.

If the jury find from the evidence that the old logs were originally cut and severed from the soil by others than themselves, then, as to such logs or timber cut, these defendants are not responsible for the original cutting and severing from the soil if the defendants had no connection therewith at the time of cutting. (Given, but with the modication as follows:) But the defendants are liable if you find from the evidence that they unlawfully took such logs after they (the logs) had unlawfully been cut by others.

UNITED STATES *v.* LYNDE ET AL.

Circuit court, district of Montana (47 Fed. Rep., 297).

* * * * * * *

A citizen of the United States and resident of Montana Territory may lawfully cut and remove timber from the public mineral lands for building, agricultural, mining, or other domestic purposes under the statutes of the United States, which provide that all citizens of the United States and other persons, bona fide residents of certain States and Territories, including Montana, are authorized to fell and remove timber growing on public mineral lands, not subject to entry, for building, agricultural, mining or other domestic purposes, subject to regulations prescribed by the Secretary of the Interior.

See also U. S. *v.* O. A. Dodge, cited on page 125.

RAILROAD COMPANIES CAN NOT TAKE TIMBER FROM PUBLIC LANDS UNDER ACT OF JUNE 3, 1878 (20 STAT., 88).

UNITED STATES *v.* EUREKA & P. R. CO.

Circuit court, district of Nevada (40 Fed. Rep., 419).

PUBLIC LANDS—TIMBER—CUT FOR USE BY RAILROAD COMPANY.

The defendant, a railroad corporation, purchased for use upon its locomotives and cars, wood severed from the public mineral lands. *Held*, that such purchase and use was unlawful, and that the United States could recover from defendant the value of the wood so severed and purchased by it.

TIMBER ON MINING CLAIMS.

Locators of mining claims, so long as they comply with the law governing their possessions, are invested by Congress with the exclusive

right of possession and enjoyment of all the surface included within the lines of their locations, and it is the duty of the locator to care for his claim should trespass be attempted thereon, since he is concerned for its protection and may undoubtedly maintain suit to that end. (See 1 L. D., 615.)

UNITED STATES *v.* LEVI W. NELSON.

District court, district of Oregon (5 Sawyer, 68).

MINING GROUND.

A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so he has a mere license to work the ground for the precious metals therein and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently.

SAME.

The defendant occupied 70 acres of public land as mining ground and cut timber from 4 acres thereof in advance of his mining operations and disposed of the same for his own benefit, assigning as a reason therefor that by cutting the timber in advance of the mining operations the stumps would rot and therefore be more easily removed. *Held*, that this cutting was not necessary to the mining operation, and therefore unlawful.

CUTTING TIMBER ON MILL SITES.

A. B. PAGE.

If such claim be timbered claimant may cut for construction of mill, but not for sale for private gain.

Commissioner McFarland to A. B. Page, Jasper, Colo., March 22, 1883.

Yours of 5th instant received and contents noted. In reply thereto you are advised that any miner holding the possessory right to a vein or lode, or any owner of a quartz mill or reduction works, and not owning a mine in connection therewith, may make location of a mill site, as provided by section 2337, Revised Statutes, and upon complying with the conditions specified therein may obtain patent therefor. The quantity of land embraced in each mill-site claim can not exceed 5 acres, and must be nonmineral in character. If the mill-site claim is timbered there would seem to be no good reason why the lawful claimant should not be permitted to cut and remove the timber thereon for the purpose of constructing a mill, reduction works, tramways, or other accessory required in the development of his mining interests. In permitting the removal of the timber from such mill site or tract of nonmineral land prior to the issuance of patent therefor, it is strictly forbidden to make such timber an article of sale for private gain or speculation, but the same must be used and applied to the actual development of the mining interests of the individual claimant.

OPERATION OF THE ACT OF JUNE 3, 1878 (20 STAT., 88) DISTINGUISHED FROM THAT OF THE ACT OF JUNE 3, 1878 (20 STAT., 89).

UNITED STATES *v.* SMITH.

Circuit court, district of Oregon (11 Fed. Rep., 487).

TIMBER ON PUBLIC LANDS IN OREGON.

The act of June 3, 1878 (20 Stat., 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the act of the same date (20 Stat., 89), providing, among other things, for the sale of timber lands therein.

MINERAL DISTRICT.

This term, as used in the first of the said acts of June 3, 1878 (20 Stat., 88), has no application to Oregon, there being no such division or district of the State established either by law or common reputation.

See decision in full, cited on page 75.

UNITED STATES *v.* BENJAMIN.

Circuit court, district of California (21 Fed. Rep., 285).

PUBLIC LANDS—CUTTING TIMBER ON MINERAL LANDS IN CALIFORNIA—ACT OF JUNE 3, 1878, CHS. 150 AND 151.

Timber upon mineral lands in the State of California is protected and governed by the provisions of the act of June 3, 1878, chapter 151 (20 Stat., 89), made specifically applicable to that State, and not by the general provisions of chapter 150 of the act of June 3, 1878 (20 Stat., 88), which can only operate upon "mineral districts," if any there be, not specifically provided for by designating the particular State or Territory in which it is situated by name.

See decision in full, cited on page 80.

TIMBER ON MINING CLAIMS IN CERTAIN FOREST RESERVATIONS IN COLORADO.

See act of February 20, 1896 (29 Stat., 11), on page 137.

TIMBER AND STONE LAND ACT.

[Act of June 3, 1878, Chap. 151; 20 Stat., 89.]

AN ACT for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association

of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalites of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant,

in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut

timber, or removed or caused to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

This act was made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348).

[Act of August 4, 1892; 27 Stat., 348.]

* * * * * * *

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

UNITED STATES *v.* WILLIAMS AND OTHERS.
UNITED STATES *v.* WILLIAMS AND ANOTHER.

Circuit court district of Oregon (18 Fed. Rep., 475).

CUTTING TIMBER ON THE PUBLIC LANDS.

Section 4 of the act of June 3, 1878 (20 Stat., 89), prohibits the cutting of any timber on the public lands with intent to dispose of the same; but the proviso thereto permits a settler under the preemption and homestead acts to clear his claim as fast as the same is put under cultivation, and the timber cut in the course of such clearing may be disposed of by the settler to the best advantage.

SAME.

But if such settler cuts timber on his claim with the intent to dispose of the same, and not merely as a means of preparing the land for tillage, he is a wilful trespasser, and is liable accordingly.

DAMAGES FOR CUTTING TIMBER.

The measure of damages in an action for cutting timber on the public lands, in case the trespass is inadvertent and not wilful, is the value of the timber in the tree; but where the trespass is wilful, the value of the labor put upon it by the trespasser must be added to the value in the tree, with interest thereon in either case.

TRESPASS BY MISTAKE.

The defendant claimed to have taken up a homestead on the northwest quarter of section 22 of township 19, and, while intending to cut saw logs thereon, with intent to dispose of the same, did, by mistake, cut said logs on the northeast quarter of said section. *Held*, that if the defendant had cut the logs on the northwest quarter, as he intended, it would have been a wilful trespass, and therefore his mistake was immaterial, and he was liable to the United States for the value of said logs as a wilful trespasser.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 2, 1896.

SIR: By reference from the Department, I am in receipt of your letter of May 14, 1896, addressed to the honorable Secretary of the Interior, and requesting reply to the following questions:

1. Have we the right to take timber from Government land to satisfy the requirements of our flumes and mines?
2. Have we the right to cut logs for miners owning claims in the neighborhood and to receive toll therefor?

You are advised that under the proviso to section 4, act of June 3, 1878 (20 Stat., 89), the miner is authorized to cut the timber necessary to be cut in clearing his land in the ordinary working of his mining claim, and to support his improvements. The proviso limits the cutting on the public lands to that done by a miner or agriculturist on his claim and for two purposes, viz, to enable him to work his claim for mining or farm purposes and to supply himself with the timber needed for his improvements. It does not license any cutting on the public lands beyond the limits of a mining or homestead claim, for the purposes above mentioned or for any other purpose.

Therefore it appears that you have no right to take timber from vacant Government land to supply your flumes and mines.

In reply to your second inquiry, you are advised that miners have the right to employ others to cut for them such timber as, and above stated, they are authorized to cut either for clearing or for improvements, and they may receive in exchange for timber so cut lumber to be used for the improvements for which the said timber was cut.

It therefore appears that you may negotiate with a miner or agriculturist to cut for him the timber necessary to be removed from his claim in the ordinary adaptation of it to mining or for farm purposes, or the timber needed for improvements.

The timber cut for clearing in the ordinary working of a mining claim or preparing a homestead claim for tillage may be sold for money. The timber cut for improvements may be exchanged for the lumber needed and to be applied to such improvements.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Mr. W. E. COUL,
Applegate Water Company, Jacksonville, Oregon.

PAYMENT OF $2.50 PER ACRE, UNDER SECTION 5 OF THE ACT OF JUNE 3, 1878 (20 STAT., 89), ONLY RELIEVES FROM CRIMINAL LIABILITY.

UNITED STATES *v.* SCOTT ET AL.

Circuit court, northern district of California (39 Fed. Rep., 900).

PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.

A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of $2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of 1878 (1 Supp. Rev. Stat., p. 329, sec. 5); he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

SECTION 2461, U. S. R. S., NOT REPEALED BY THE ACT OF JUNE 3, 1878 (20 STAT., 89).

DEPARTMENT OF THE INTERIOR,
Washington, D. C., September 24, 1878.

SIR: I have the honor to transmit herewith a copy of a telegram received from Special Agent Hobbs, dated San Francisco, Cal., June 21, 1878, in which he states that the United States attorney says: "The repeal of the old timber law leaves no criminal statute in force under which a party may be prosecuted for past offenses, unless suits are already commenced." I also transmit copy of the rules and regulations adopted by this Department in accordance with the provisions of two certain acts of Congress approved June 3, 1878, in relation to the sale and disposal of timber lands, and the punishment for depredations thereon (Pamphlet Laws for 1877–78, pp. 88, 89, 90, 91).

These acts provide for the sale and disposal of timber lands, and also specify in what cases prosecutions shall be brought for depredations thereon in the future. The fifth section of the act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," provides for the settlement of cases prosecuted under section 2461 of the Revised Statutes. I do not understand, however, that either of said acts was intended to repeal section 2461, nor in any manner to affect the prosecution of persons for depredations already committed, except as therein specified. While it is true section 5 of the act prescribes a rule for settlement, this does not necessarily, nor in fact, take away the right of the Government to prosecute persons who have trespassed upon the public lands. Should you agree with me in these conclusions, I have the honor to recommend that you will instruct the United States attorney for the State of California to prosecute all cases of trespass, wherever committed, if he shall deem the evidence in his possession sufficient to warrant the prosecution, which may be, or may have been reported to him, in the same manner that they were heretofore prosecuted; and if the persons thus prosecuted are convicted, and desire to make settlement in accordance with the terms of

the fifth section of said act, that settlement should be made accordingly, and the further proceedings in the case dismissed.

Very respectfully,

C. SCHURZ, *Secretary.*

Hon. CHARLES DEVENS,
Attorney-General.

[16 Op., 189.]

Sections 4 and 5 of the act of June 3, 1878, chapter 151, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," construed in connection with section 2461, Revised Statutes, punishing the cutting or removal of timber growing on the public lands.

DEPARTMENT OF JUSTICE, *October 22, 1878.*

SIR: I have carefully considered paragraph 1 of the "Rules and Regulations for the Protection of Timber," etc, transmitted with your letter of September 24, in connection with Revised Statutes, section 2461, and the two acts of June 3, 1878.

Section 4 of the longer of these two acts merely singles out from the offenses described in section 2461 that of cutting or removing timber "with intent to export or dispose of it," and affixes to it a new and different penalty.

Section 5 simply allows all persons prosecuted for the cutting or removal of timber, "except those who cut or removed with intent to export," to relieve themselves from the penalties prescribed in section 2461 by the payment at the rate of $2.50 an acre of the land on which the trespasses were committed. The effect of this provision is to release offenders from the penalties incurred for offenses committed under the former law prior to the passage of the new act, on their compliance with the specified conditions; those who cut or removed "with intent to export" being expressly excluded from the benefit of the provision.

I see nothing in the language of the provision that limits its operation to prosecutions actually pending when the act was passed.

The effect of the proviso in section 4, as also of the other act of the same date, is simply to exempt certain specified cases from the operation of the provisions of section 2461. It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply.

I am therefore of opinion that paragraph 1 of the rules and regulations transmitted is in accordance with law.

The United States attorney for the district of California has been instructed to be governed in his official action in regard to timber cases by the views expressed in this letter, a copy of which has been forwarded to him.

Very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1896.

SIR: I have the honor to acknowledge the receipt, by reference from the Department, "for consideration, report in duplicate, and return of papers," of a letter from the Attorney-General dated May 7, 1896, transmitting copy of a letter from the United States attorney for the western district of Wisconsin, urging the importance of early action on reports submitted to this office presenting evidence in cases of alleged trespasses upon public timber, and adding as follows:

Again, in all of these cases the General Land Office almost uniformly recommends criminal prosecution. Congress has so legislated that the remedy by criminal prosecution is almost worthless to the Government. The statute supposed to apply is section 2461, under which the penalties are appropriate. Congress, however, in 1878 (1 Supp. 1891, p. 167), passed an act relating to California, Oregon, and other States, by section 4 of which act the cutting of timber in said States is made merely a misdemeanor and the penalty limited to a fine of not less than $100 nor more than $1,000. This act, in 1892, was made general as to all public-land States (27 Stat., 348). The only punishment, therefore, now existing is a fine of not less than $100 nor more than $1,000. A person in prison for nonpayment of this fine could swear out as a poor convict at the end of thirty days. Whether a criminal prosecution is desirable, therefore, is a question to be carefully considered in each particular case.

In regard to the question thus raised as to whether section 2461 U. S. R. S. was repealed by the subsequent act of June 3, 1878 (20 Stat., 89), the operation of which was extended to all the public-land States by the act of August 4, 1892 (27 Stat., 348), I have the honor to report that this question was raised in letter from the Department to the Attorney-General, under date of September 24, 1878, transmitting copy of certain rules and regulations (presumably of August 15, 1878, copy herewith) in connection with section 2461 and the two acts of June 3, 1878 (20 Stat., 88, and 20 Stat., 89).

In said letter it was held as follows:

I do not understand, however, that either of said acts was intended to repeal section 2461, nor in any manner to affect the prosecutions of persons for depredations already committed, except as therein specified. While it is true section 5 of the act prescribes a rule for settlement, this does not necessarily, nor in fact, take away the right of the Government to prosecute persons who have trespassed upon the public lands. Should you agree with me in these conclusions I have the honor to recommend that you will instruct the United States attorney for the State of California to prosecute all cases of trespass * * * which may be or may have been reported to him in the same manner that they were heretofore prosecuted; and if the persons thus prosecuted are convicted and desire to make settlement in accordance with the terms of the fifth section of said act that settlement should be made accordingly and the further procedings in the case dismissed.

The Attorney-General, in reply (see 16 Op., 190), states as follows:

Section 4 of the longer of these two acts merely singles out from the offenses described in section 2461 that of cutting or removing timber "with intent to export or dispose of it," and affixes to it a new and different penalty.

Section 5 simply allows all persons prosecuted for the cutting or removal of timber, except those who cut or removed "with intent to export," to relieve themselves from

the penalties prescribed in section 2461 by the payment at the rate of $2.50 an acre of the land on which the trespasses were committed. The effect of this proviso is to release offenders from the penalties incurred for offenses committed under the former law prior to the passage of the new act on their compliance with the specified conditions, those who cut or removed "with intent to export" being expressly excluded from the benefit of the provision.

I see nothing in the language of the provision that limits its operation to prosecutions actually pending when the act was passed.

The effect of the proviso in section 4, as also of the other act of the same date, is simply to exempt certain specified cases from the operation of the provisions of section 2461. It is a necessary implication from these special provisions that the former law continues in force in respect to all cases to which they do not apply.

I am, therefore, of opinion that paragraph 1 of the rules and regulations transmitted is in accordance with law.

The United States attorney for the district of California has been instructed to be governed, in his official action in regard to timber cases, by the views expressed in this letter, * * * .

In addition to the points covered by the above correspondence between this Department and the Department of Justice, I desire to invite attention to the following facts:

Section 2461 U. S. R. S. is derived from section 1 of the act of March 2, 1831 (4 Stat., 472), and section 4751 U. S. R. S. is derived from section 3 of the same act.

The act of June 3, 1878 (20 Stat., 89), makes the special provision that section 4751 U. S. R. S. is repealed thereby so far as relates to the States and Territory therein named, but makes no such provision in respect to the remainder of the said act of March 2, 1831, from which it appears fair to conclude that only that portion of the act of March 2, 1831, comprehended in section 4751 U. S. R. S. was intended by Congress to be repealed, and that section 2461 remained untouched.

I also respectfully invite attention to the case of Shiver *v.* United States (159 U. S., 491).

The referred papers are herewith returned.

Very respectfully, S. W. LAMOREUX,
Commissioner.

The SECRETARY OF THE INTERIOR.

Approved by the Secretary of the Interior in letter of May 23, 1896, to the Attorney-General.

THE ACTS OF JUNE 3, 1878 (20 STAT., 88), AND JUNE 3, 1878 (20 STAT., 89), CAN NOT BOTH BE IN FULL FORCE IN THE SAME PLACE.

UNITED STATES *v.* SMITH.

Circuit court, district of Oregon (11 Fed. Rep., 487).

TIMBER ON PUBLIC LANDS IN OREGON.

The act of June 3, 1878 (20 Stat., 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the act of the same date (20 Stat., 89), providing among other things, for the sale of timber lands therein.

MINERAL DISTRICT.

This term, as used in the first of the said acts of June 3, 1878 (20 Stat., 88), has no application to Oregon, there being no such division or district of the State established either by law or common reputation.

CUTTING TIMBER—WHO MAY AND WHAT FOR.

Under the act of June 3, 1878 (20 Stat., 89), persons occupying the public lands in Oregon under the mining, preemption, or homestead laws of the United States may cut and use the timber thereon convenient for the purposes of such occupancy, and may also take other timber from the public lands, if need be, sufficient to maintain the necessary improvements on the lands so occupied; but any cutting or removing timber from the public lands otherwise than this, as with intent to dispose of or wantonly to destroy the same, is a trespass for which the party guilty of the same is liable, civilly and criminally (20 Stat., 90).

DEADY, D. J.:

This action is brought by the United States to recover from the defendant the sum of $10,000 damages for wrongfully cutting and carrying away certain timber between January 1, 1879, and the commencement of the action, August 17, 1881, then being and growing upon that parcel of the unsurveyed public lands of the plaintiff, situated in Baker County, Oreg., which, if surveyed, would be township 11 south, of range 40 east, of the Willamette meridian, with intent to dispose of the same, and for that he "did convert and dispose of the same."

The defendant, for answer to the complaint, denies the allegations thereof, and for a further answer says that at the time of committing the alleged unlawful acts the defendant was a citizen of the United States, over 21 years of age, and a bona fide resident of "a mineral district of the United States," consisting of Baker, Grant, Union, Umatilla, and Wasco counties, the same being "the fourth mineral district of the United States in the State of Oregon," and that while he was such a resident he did enter upon the unsurveyed tract of public land aforesaid, the same being within said mineral district, and "cut and remove therefrom a small number of trees growing thereon;" that said tract of land was mineral land, and not subject to entry under any law of the United States, "except for mineral entry;" that said trees were "cut and removed and actually used for building, agricultural, mining, and domestic purposes by defendant and others within said mineral district;" and that the cutting and removing of said trees constitute the trespass mentioned in the complaint. The plaintiff demurs generally to this defence.

The first act of Congress which in terms authorized or permitted the cutting of timber upon the public lands by a private person for any purpose was passed June 3, 1878 (20 Stat., 88), and is entitled "An act to authorize the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes." This act contains three sections. The first one authorizes any bona fide resident of the States aforesaid or either of the Territories—naming them—"and all other mineral districts of the United States," to fell and remove, for building, agricultural, mining, or other domestic

purposes," any trees growing upon the public lands, "said lands being mineral," and not then subject to entry, "except for mineral entry;" subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber upon said lands, and other purposes, with a proviso that the act should not "extend to railroad corporations." The second section makes it the duty of the officers of any local land office "in whose district any mineral land may be situated" to ascertain whether timber is cut or used upon such mineral lands, "except for the purposes authorized by the act," and to give notice thereof to the Commissioner of the General Land Office. The third section prescribes the punishment for a violation of the act, or the rules made in pursuance thereof.

The act is very loosely and unskillfully drawn and abounds in unnecessary and indefinite phrases and clauses of the and so forth character. The privilege conceded by it is limited to citizens of the United States, "and *other* persons" resident in certain States and Territories—naming them—"and all *other* mineral districts of the United States." It allows timber "or *other* trees" to be cut for building, agricultural, mining, "or *other* domestic" purposes, subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth, "and for *other* purposes."

On the same day another act was passed (20 Stat., 89), entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory." This act contains six sections. The first, second, and third ones provide for the sale of the "unsurveyed public lands" within these States and this Territory not included in any reservations of the United States, valuable chiefly for timber or unfit for cultivation, which have not been offered for sale, in quantities not exceeding 160 acres to one person or association, at the minimum price of $2.50 per acre; with a proviso that the act should not, among other things, authorize the sale of a "mining claim" or "lands containing gold, silver, cinnabar, copper, or coal."

Section 4 provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy *any timber growing on any lands of the United States*" in the States or Territory aforesaid, "or remove or cause to be removed any timber from such public lands with intent to export or dispose of the same;" * * * and that any person so offending shall, on conviction, be fined for every such offence not less than $100 nor more than $1,000, with a proviso that the act shall not "prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Section 5 provides for the relief of persons prosecuted in said States and Territory for the violation of the timber act of March 2, 1831 (4 Stat., 472; sec. 2461, Rev. Stat.), and repeals section 4751 of the Revised Statutes, providing for the disposition of penalties

and forfeitures incurred under said act or section, and directs that all moneys collected under that act shall be covered into the Treasury of the United States. Section 6 provides that all acts and parts of acts inconsistent with such act are repealed.

In support of this plea or defence counsel for the defendant contends: (1) That the first-named act applies to Oregon, as well as the States and Territories therein expressly named, because it is included in the phrase "all other mineral districts of the United States;" and (2) that the permission contained in the first section of such act to fell and remove timber is not limited to the land occupied by the party cutting or removing it, nor to the quantity needed for his individual use, but that it is a license to every resident of a "mineral district," so called, in the United States to fell and remove all the timber he may from any portion of the public lands in such district, whether mineral, agricultural, or timber, to be used by anyone within the district for building, agricultural, mining, or other domestic purposes; and further, that the second act, although made applicable to Oregon by name, in no way affects or limits the operation of the first one therein. If this is the law, then all the timber on the public lands in Oregon may be cut and removed therefrom with impunity, provided it is not done for the purpose of being exported from the State or mineral district where cut. No adequate reason is given or suggested why Congress should thus suddenly depart so far from the traditional policy of the Government to preserve the timber on the public lands for the use of those to whom it might ultimately dispose of them.

The argument hinges upon the meaning and application of the phrase "mineral district." The use of it in the United States statutes is new, and confined to this act. As a matter of fact, so far as appears, there is no section of this State known and defined as the mineral district. Being neither known in law or fact as the designation of any well-defined or exact locality, it is as void of meaning and incapable of application as the phrase "tree district," "stone district," "alkali district," or "water district." The title of the act does not contain the phrase, but limits its operation to the citizens of Colorado, Nevada, and the Territories; and it is not probable that there was any thought in the mind of Congress of extending it any further.

The phrase "mining district" is well known, and means a section of country usually designated by name or understood as being confined within certain natural boundaries, in which gold or silver or both are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein, as the White Pine, the Humboldt, etc.

This term, and the thing signified by it, are also recognized by the United States statutes (secs. 2319, 2324, Rev. Stat.; Copp, U. S. Min. Lands, 471).

There is no method of proceeding known to the law by which a

district of country can be prospected, surveyed, and established, or declared to be a "mineral district." The ordinary surveys of the public lands do not include any examination or exploration of them for mineral deposits, the surveyor being only required "to note in his field book the true status of all *mines*, salt licks, salt springs, and mill seats which come to his knowledge." (Sub. 7, sec. 2395, Rev. Stat.) By section 12 of the act of May 10, 1872, entitled "An act to promote the development of the mining resources of the United States" (17 Stat., 95; sec. 2334, Rev. Stat.), it is provided that the surveyor-general "may appoint in each *land* district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims." This "land district" is a division of the State or Territory, as the case may be, created by law, in which is located a land office for the disposition of the public lands therein. There are four of them in this State. It is probable that these "land districts," in the mining States like Colorado and Nevada, were sometimes familiarly spoken of as "the mineral districts," from whence the phrase found its way into the act of June 3, 1878. But although there are "some mineral lands" and "mining districts" in Oregon, it is not known that there are any considerable or contiguous sections of the country to which the term "mineral district" could properly be applied, and it is certain that there is none to which it is applied by law. It may be admitted that the use of the general words "all other mineral districts of the United States," immediately following the enumeration of the particular States and Territories mentioned, is some evidence of an intention by Congress to extend the operation of the act beyond the limits of said States and Territories. But the difficulty is that the language used has no definite signification or local application, and therefore must fail to have any effect for want of certainty. Besides, this act is one in favor of individuals and in derogation of the rights of the public—the whole people of the United States—to whom these lands and timber belong, and therefore is not to be enlarged by construction so as to include things or persons not expressly enumerated, mentioned, or described therein with reasonable certainty. (Smith, Com., sec. 738 et seq.) For these reasons the act, in my judgment, is not applicable to Oregon, but is confined to the States and Territories therein expressly mentioned.

By act No. 2 of the said acts of date of June 3, 1878, it is declared unlawful to cut *any* timber on *any* of the public lands in Oregon with the exception of that cut by a "miner or agriculturist" in the ordinary working or clearing of his mining claim or farm or that taken therefrom to support his improvements on such claim or farm. This provision is inconsistent with and repugnant to the license to cut timber contained in act No. 1. Either the prohibition contained in act No. 2 must be limited and restrained by construction so as not to apply to mineral land—land subjected to "mineral entry"—or act No. 1 must be held not applicable to Oregon. Both can not be in full force in the

same place. It may be said that No. 2, being subsequent in point of place in the statute, is presumed to have been passed subsequently to the other, and therefore repeals or modifies it so far as they are in conflict. But both acts being passed on the same day and measurably upon the same subject, I think they may best be considered as part of one act, and each be allowed to stand and have effect as far as it can without conflict with the other. It can not be said that in passing act No. 1 Congress expressly included Oregon in the license therein given to cut timber on the public lands, and it is only claimed that it contains some general words which may be interpreted so as to include it, while upon the very face of the act it is plain that in the passage of No. 2 it was the intention of Congress to regulate the subject of the sale and use of the timber upon any of the public lands in Oregon. This being so, the only reasonable conclusion is that act No. 2 excludes No. 1 even if there was any ground for holding the latter applicable to this State under any circumstances. The subject is fully regulated by the former act, and there is nothing left for the latter one to operate upon without displacing some provision of the other. The provision for the sale of timber lands, for the prevention of cutting timber on the public lands, and for allowing the miner and farmer to cut and use the timber on their claim and to take it from the public lands for the improvement of such claims cover the whole ground, and if allowed to be in full force here must exclude the Colorado act from the State.

The plea is insufficient. A defence to an action for unlawfully cutting timber on the public lands in this State must show that it was cut upon the mining or farming claim or land of the defendant in the ordinary course of working the same or preparing it for tillage, as the case may be, or was taken from the public lands for the necessary improvements thereon. It does not appear from the plea herein that the defendant cut the timber in question from land then occupied by him for the purpose of mining or agriculture, or that it was cut from the public lands for maintaining the necessary improvements thereon.

From all that appears, the defendant was unlawfully engaged in cutting timber from the public lands, and is at least liable to the plaintiff in damages equal to the value thereof.

The demurrer is sustained.

UNITED STATES *v.* BENJAMIN.

Circuit court, district of California (21 Fed. Rep., 285).

PUBLIC LANDS—CUTTING TIMBER ON MINERAL LANDS IN CALIFORNIA—ACT OF JUNE 3, 1878, CHAPTERS 150, 151.

Timber upon mineral lands in the State of California is protected and governed by the provisions of the act of June 3, 1878, chapter 151 (20 Stat., 89), made specifically applicable to that State, and not by the general provisions of chapter 150 of the act of June 3, 1878 (20 Stat., 88), which can only operate upon "mineral districts," if any there be, not specifically provided for by designating the particular State or Territory in which it is situated by name.

SAWYER, J.:

The United States bring this action to recover the value of lumber alleged to have been manufactured from timber trees unlawfully cut on the public lands. The defendant, as a justification, specially answers that the trees from which the lumber in question was manufactured grew and were cut "in a mineral district of the United States," known as such throughout the State, and so recognized by the customs of miners and the decisions of the courts, and designated "The Georgetown Mineral and Mining District," being "in the mineral belt of said State of California and county of El Dorado;" that defendant was and is a citizen of the United States, and a bona fide resident of said "Georgetown Mineral District;" that the land on which said trees grew was public land of the United States, mineral in character, and not subject to entry under existing laws of the United States, except as mineral lands; that the lumber "was used in said mineral district and adjoining mineral districts of said county of El Dorado for building, agricultural, mining, and other domestic purposes, but principally for mining purposes; that said timber was felled, removed, and used for the said purposes, * * * in accordance with the rules and regulations prescribed by the Secretary of the Interior;" and that said timber "was felled and removed, and said act committed, under a license from the United States, under and by virtue of an act approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and other Territories to fell and remove timber on the public domain for mining and domestic purposes."

The act under which defendant attempts to justify provides—

That all citizens of the United States, and other persons bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes.

The United States attorney insists that this act is not applicable to the State of California, and, consequently, it can afford no justification of the acts complained of. The defendant, on the other hand, contends that the words "*all* other *mineral* districts of the United States" embrace every "*mining* district," recognized as such by the customs of miners of the locality embracing it, in whatever State or Territory it may be situated. A similar question arose in the circuit court for the district of Oregon in U. S. *v.* Smith, in which Deady, J., after a full and careful consideration of the question, held that the act did not apply to the State of Oregon (U. S. *v.* Smith, 8 Sawy., 101; S. C., 11 Fed. Rep., 487).

If it does not apply to Oregon, for similar reasons it is inapplicable to California.

After a careful consideration of the question, I am constrained to concur in the conclusion reached by the district judge of Oregon, and hold the provision to be inapplicable to California.

If this act stood alone, the position taken by the defendant's counsel would not be without plausibility. But, unfortunately for him, it does not stand alone. On the same day another act was passed, specifically applicable to timber lands in the States of California, Oregon, Nevada, and Washington Territory, which contains provisions wholly inconsistent with the provisions relied on in the act relating specifically to Colorado and the Territories therein named. It does not appear which act was, in fact first passed, but probably it was the first-mentioned act relating to Colorado, etc., as that is designated in the statutes as chapter 150, while the act relating to California, etc., is numbered chapter 151 of the statutes (see 20 Stat., 88, 89.) If the latter act is to be treated as a subsequent statute, it repeals the inconsistent provisions of the prior act, as it expressly provides that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed," (sec. 6). But the most favorable view for the defendant is to regard the two statutes, as they were both passed on the same day, as constituting but one statute, the former part of the act making specific provisions for Colorado, and the other States and Territories named; and the subsequent provisions of the act making like provisions for California and the other States and Territories therein named. So viewing the statute, we must, if possible, construe all the provisions in such manner that every part can stand and have effect.

In such cases also, loose general provisions of doubtful import in the former part of the statute must yield to subsequent clear and specific provisions, which are so explicit as to admit of but one construction. The clause, "all other mineral districts of the United States," in the first-named act, as shown by Deady, J., in the case already cited, is very general and exceedingly indefinite and uncertain as to its application, while the provisions of the other act are made *specifically* applicable to the State of California by terms so clear and explicit as not to be open to any other construction. The most that can be said of the general clause is that it can only refer to "all other mineral districts of the United States" not otherwise specifically pointed out by other provisions of the act—the two acts being regarded as one. But California is otherwise specifically provided for. In my judgment, the timber upon the public lands in the State of California is protected and governed by the provisions of the second act, made specifically applicable to California, and not by the loose *general* provisions of the first act, which can only operate upon "mineral districts," if any there be, not specifically provided for, by designating the particular State or Territory in which it is situated by name.

To hold otherwise would be to make the specific and certain yield to the general, indefinite, and uncertain, which would be contrary to the well-established canons of statutory construction. The second act expressly provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, *any timber* growing on *any lands* of the United States in *said States* and Territories," of which California is the first specifically named in the act: "*Provided*, That nothing herein contained shall prevent any *miner* or *agriculturist* from clearing *his* land *in the ordinary working* of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Thus it will be seen that the right to cut timber is much more restricted as applied to the States and Territories named in this act than the right conferred on the residents of the States and Territories named in the other act. In this act the right is limited strictly to the *miner* and *agriculturist*, and is restricted to cutting timber on his *own mining claim* or *farm*, and to the purpose of clearing the land in the "ordinary working of his mining claim," or "preparing his farm for tillage," and to "taking the timber necessary to support *his* improvements." The part of the answer in question does not show defendant to be either a miner or farmer, or that he cut the timber on his own mining or farming claim, or that he did it for any of the designated purposes. Indeed he does not attempt to bring himself within the provisions of this act relating specifically to California, but he relies wholly on the other act, which specifically relates to Colorado, and the other Territories and districts therein named, in general indefinite terms, which latter act is much more liberal in its provisions than the other.

It follows that the facts alleged are insufficient to constitute a defense, and, if true, are wholly immaterial.

The demurrer must be sustained, and the motion to strike out granted; and it is so ordered.

TIMBER ON HOMESTEAD ENTRIES.

UNITED STATES *v.* LEVI W. NELSON.

District court, district of Oregon (5 Sawyer, 68).

TIMBER ON PUBLIC LANDS.

The enactment of the preemption, homestead, and mining laws by Congress has modified the operation of the act of March 2, 1831 (sec. 2461, Rev. Stat.), prohibiting absolutely the cutting or removal of timber on the public lands, so that persons occupying portions of such lands under such laws may, before becoming the owners thereof, cut and use the timber thereon so far as the same may be necessary to accomplish the purpose for which the land is occupied.

See U. S. *v.* O. A. Dodge, cited on page 125.

THE TIMBER CASES.

District court, western district of Missouri (11 Fed. Rep., 81).

PUBLIC LANDS—RIGHTS OF SETTLERS.

Where a person enters upon public land with a view of preempting it, and before the expiration of the year during which he ought to have proven up his claim he homesteaded his preemption, the preemption as well as the homestead must have been taken in good faith for the purpose of residence, settlement, and improvement.

SAME—RIGHT TO CUT TIMBER.

A person entering on the public land for the purpose of preemption, or to secure a homestead, in good faith, may cut the timber standing thereon for the purposes of cultivation, and after applying such portion as can be used for the improvement he may sell or dispose of the balance.

SAME—RESTRICTION AS TO RIGHT.

A settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the lands and destroy the value of the public domain, even though he intends to acquire the title under his claim.

See "Use of public timber by virtue of right of occupancy," case of United States *v.* Cook (19 Wall., 591), on page 47.

See also, decision in case of Isadore Cohn (20 L. D., 238), cited on page 26.

UNITED STATES *v.* YODER.

District court, district of Minnesota (18 Fed. Rep., 372).

ACTION OF TROVER—RIGHT OF SETTLERS TO CUT TIMBER AND IMPROVE LAND BEFORE PREEMPTION.

A settler claiming in good faith a homestead can, for the purpose of improving the land, cut down the necessary timber before he files his entry in the land office. There is nothing in the homestead act requiring an entry in the land office before settlement.

UNITED STATES *v.* LANE.

Circuit court, eastern district of Wisconsin (19 Fed. Rep., 910).

PUBLIC LAND—ENTRY—RIGHT TO CUT TIMBER.

One who has entered upon public land according to law for the purpose of claiming a homestead therein, and is residing thereon in good faith and improving it for agricultural purposes, is entitled to cut so much timber from the land as is necessary for his actual improvements; but until he has received his patent he can not cut timber for any other purposes nor under any other conditions.

UNITED STATES *v.* PERKINS ET AL.

Circuit court, western district of Louisiana (44 Fed. Rep., 670).

PUBLIC LANDS—CUTTING TIMBER—SUBSEQUENT PURCHASE.

Where a homesteader, who has never had possession of the land included in his homestead claim, and whose entry has been canceled, buys the land from the Government, such purchase does not pass title to timber which he had cut from the land before his purchase and after he had learned that his homestead entry was invalid.

SAME—MEASURE OF DAMAGES.

In an action by the United States for the value of timber bought by defendant from a trespasser who had knowingly cut it from the public land, the measure of damages is the value of the timber at the time of the purchase.

STONE *v.* UNITED STATES.

Circuit court of appeals, ninth circuit (64 Fed. Rep., 667).

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PUBLIC LANDS—SETTLERS—CUTTING AND SELLING TIMBER—LIABILITY OF PURCHASERS.

Where settlers on public lands file declarations under the preemption or homestead laws, with intent to defraud the Government by removing and selling the timber thereon, and then leaving them, a purchaser of such timber is liable to the Government for its value.

SAME—ACTION FOR VALUE OF TIMBER PURCHASED—BURDEN OF PROOF.

In an action by the United States to recover the value of timber cut from public lands, where defendant claims that he purchased the timber from settlers on such lands under the preemption and homestead laws, the burden is on him to show the good faith of such settlers, and their right to cut and sell such timber.

UNITED STATES *v.* MURPHY.

Circuit court, western district of Michigan, northern division (32 Fed. Rep., 376).

PUBLIC LANDS—CUTTING TIMBER—HOMESTEADER'S RIGHTS.

While holding land under a homestead entry the homesteader can only cut and sell the timber from such portion or parts of the land as are being cleared for cultivation or settlement.

SAME—CUTTING TIMBER—MISTAKEN VIEW OF RIGHTS.

The fact that defendant was induced, through the wrong representations of the register of the land office, to believe in the unrestricted right of the homesteader to cut timber from his entry, does not estop the Government from prosecuting him for such unlawful cutting.

SAME—CUTTING TIMBER—CRIMINAL INTENT.

It is no defense to a prosecution for unlawful cutting of timber from public land that there was no criminal intent in the cutting.

SAME—ACTS RELATING TO—CONSTRUCTION OF, BY SECRETARY OF INTERIOR.

The interpretation placed upon public-land acts by the Secretary of the Interior is not binding upon the courts.

In the case of a homesteader purporting to convey by bill of sale right to the timber on his claim subsequent to abandonment of the land, parties taking the timber under such "bill of sale" held to be trespassers and liable to the United States for the full value of the timber, wherever and in whatever condition found. (See Land Office Report for 1889, p. 291, case of U. S. *v.* John C. Kirby et al.)

THE UNITED STATES *v.* HENRY HAZLETT.

Circuit court, district of Idaho.

BEATTY, J.

This action is for the replevin of a lot of cedar posts, and is submitted to the court for hearing upon an agreed statement of facts from which

it appears that such posts were cut by defendant from a tract of 10 acres of the public lands of the United States; that said 10 acres were a part of a tract of 160 acres upon which one Brennan had resided for two years with the intention of entering it as a homestead when surveyed; that defendant had a contract with the Union Pacific Railway Company to deliver it posts at Pocatello to fence its railroad track which had been completed and in operation for over eight years prior; that such place of delivery was 700 miles from the place of cutting such posts; that said Brennan intended to clear said 10 acres for agricultural purposes and that the defendant, for the purpose of fulfilling his said contract with the railway company entered into a contract with said Brennan for the timber on said 10 acres and thereafter cut and removed the same from the land and had possession thereof when it was seized by plaintiff.

The first question is, whether the contract between the defendant and the homesteader for the timber is a valid one as against the plaintiff. The rule is well settled by numerous decisions that in actions by the United States, and especially in civil actions, for the cutting of timber on the public lands, it devolves upon the Government only to show the character of the lands and the cutting of the timber thereon, whereupon the onus probandi rests with the defendant to show such cutting was lawful.

It is also well settled that the homesteader can not cut or remove timber from his homestead for the sole purpose of selling it, but he can from time to time cut only such as is actually necessary for his use upon the premises in making the necessary improvements thereon and in clearing the land in good faith for agriculture or some other useful purpose; that if after so cutting timber in the actual process of clearing the land and making use thereof in his necessary improvements there is a surplus he may sell it.

In an action brought against a homesteader for an unlawful cutting or disposition of timber it devolves upon him to produce the facts showing his good faith. He should show the improvements he has made upon the land, the buildings and fences erected, the land cleared and how far cleared, the character of his residence upon the land, and any other facts going to show that his occupation of and acts concerning the land were those of an actual homesteader.

It is also the law that if the homesteader attempts to dispose of timber from his claim contrary to law the person contracting with or purchasing of him gets no title. If, therefore, the facts in this case do not show that the homesteader had a right to sell the timber under the circumstances he did, it follows that the defendant procured no title thereto.

What now are the facts and to what conclusion do they lead? It appears that defendant, to carry out his contract with the railway company, contracted with the homesteader for the timber upon 10 acres of

the homestead tract, and proceeded to cut and remove it. It does not appear that the land was cleared or that any improvements of any kind were made upon the land or that the land was in any way benefited by the acts of either party; and so far as the facts go it only appears that the defendant cut and removed this timber to be disposed of to the railway company. It is alleged that the homesteader had resided on the land for two years and intended to clear and enter it; but something more than mere intentions must appear, and if he had resided there the motive of his residence and occupation must be shown. The facts as stated, instead of leading to the conclusion that the land was actually occupied as a homestead and the timber was removed therefrom in good faith in the process of clearing and improving the land, rather point to the conclusion that defendant's contracts were made to avoid the law and cut the timber simply for the purpose of fulfilling his railway contract, and that Brennan's sole object was to receive money for the timber and not to clear the land or improve it. If such contracts and such facts will justify the cutting and removal of timber from the Government lands, then there is nothing in the law to prevent the destruction of all timber on all lands subject to occupation and entry. I can not so construe the law and must conclude the defendant did not by the acts stated procure title to the posts involved in this action.

I do not mean to be understood as holding that a homesteader may not employ others to clear or improve his land; but when he does, it must appear that such employment is made in good faith to have the land actually cleared and not leave the contract open to a well-grounded suspicion that it is to avoid the law and to dispose of the timber for profit instead of improving the land.

The question was raised whether the law gives the railway company the right to procure from the public domain timber supplies for its use, and if it does, whether it does not follow that defendant's contract with Brennan, being for the purpose of furnishing such supplies, is lawful. The first Congressional act granting railroads rights to timber and other material from the public lands is that of 1875 (1 Supp. Rev. Stat., 1890), by which it is provided that they may take "from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad."

The evident construction of this act, as has been held, is that it applies only to those lands lying along the line of the road, and does not include those situated a long distance from it; also that the right continues only during the time of the original construction of the road, and not to subsequent repairs, changes, or improvements. (Denver R. R. *v.* United States, 34 Fed. Rep., 838.)

It does not appear by the facts whether these posts were for the first building or the repair of fences, but this is probably immaterial, for it is doubtful whether the act was intended to include the building of

fences as a part of the construction of the road, and especially fences constructed over eight years after the completion and operation of the road. Moreover, the timber was not cut from lands adjacent to the line of the road, but on those far distant from it. The subsequent acts modifying or granting additional timber rights expressly exclude railroads from their benefits. (1 Supp. Rev. Stat., 166, 939.) It must follow that the railway company had no such right to the timber on the public lands for the purpose named in this case as will justify or sustain the contract of defendant with Brennan. Certainly the railway company has the right to purchase any timber of anyone having the right to sell.

The defendant having no title to the posts in controversy, judgment for such posts or their value of $125 and costs of action against him is now ordered.

CUTTING TIMBER ON SHARES.

UNITED STATES *v.* JAMES AUTREY.

District court, southern district of Alabama, May term, 1894.

The charge to the jury reads as follows:

"The court instructs you that the defendant had the right to cut or to cause to be cut, timber on his homestead land suitable and sufficient to build necessary and convenient houses and fences for his home, and to have that timber sawed into suitable lumber to make such improvements on his homestead, and the court further instructs you that the defendant could have done what is practically the same thing, and that is, could have exchanged timber for lumber to make such improvements; that is to say, could have exchanged timber for lumber of equal value, but only so much timber as was necessary to make the lumber for such improvements; so much as was necessary for such improvements, excluding the cost of cutting, sawing, and hauling such timber, etc., to and from the mill; and if he only did this, and did it in good faith, he should be acquitted.

"Or, if he made such exchange for lumber with a part of the timber and did so in good faith to make necessary improvements, then, as to such part he should be held guiltless, and guilty only as to the excess of timber (pine trees) over and above what was necessary to make the lumber for his improvements..

"Let me illustrate what I mean to make the proposition clearer to you. If the defendant wanted 9,000 or 10,000 feet of lumber to make his improvements, he had the right to cut or cause to be cut as many trees as were necessary for that purpose, whether it be 30, 40, or 50—whatever number of trees you find from the evidence was necessary for that purpose—but he could not lawfully cut more than that; any cutting in excess of that number of trees would be an unlawful cutting.

"He had not a right to cut trees on his homestead for the purpose of sale or profit, or to pay debts or loans of money, or to pay his expenses,

or to buy supplies—in short, no right to cut them for sale for any purpose—and he had no right to cut them and pay any such debts or expenses with them, or to cut them for any such purposes."

* * * * * *

SHIVER *v.* UNITED STATES.

Certificate from the circuit court of appeals for the fifth circuit (159 U. S., 491).

Land duly and properly entered for a homestead under the homestead laws of the United States is not, from the time of entry, and pending proceedings before the Land Department, and until final disposition by that Department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the United States; but, on the contrary, it continues to be the property of the United States for five years following the entry, and until a patent is issued.

Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, he may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps may exchange such timber for lumber to be devoted to the same purposes; but he can not sell the timber for money, except so far as it may have been cut for the purpose of cultivation; and in case he exceeds his rights in this respect, he may be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead.

In holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed to be the property of the settler, and therefore subject to taxation.

Shiver was tried upon an information filed in the district court for the southern district of Alabama for cutting and removing 200 pine trees from a quarter section of land in Monroe County, which he had entered as a homestead on January 26, 1894. It appeared that the cutting began about the 1st of April, and that all the standing timber, amounting to about 500 trees, had been, either before or after complaint was made against him, cut and removed from the land; that the defendant and his family were living on the land, and had erected a box house worth about $100; that the lumber was cut and hauled from the land by defendant's procurement; that it had been cut all over the land; that the land cleared amounted to about an acre; that the house was not yet completed; that the timber was taken to the mill of the Bear Creek Mill Company, of which defendant was an employé; that defendant was not living on the land when the cutting began, and that the trees would make upwards of 150,000 feet of lumber; that they were not cut for the purpose of clearing the land for cultivation, and that such timber was cut within four months after defendant had made his homestead entry;

that the trees yielded an aggregate of the sum of $126, while the improvements made upon the land cost $229. The lumber put into the building amounted to 9,765 feet.

There was conflicting evidence as to the motives of the defendant in cutting and selling the timber. He claimed that the logs were exchanged for lumber and building material, all of which were put into his improvement; the Government claiming that it was cut for the purpose of sale and profit.

The court instructed the jury that defendant had the right to cut timber on his homestead suitable and sufficient to build necessary and convenient houses, fences, etc., for a home, and to have that timber sawed into suitable lumber to make such improvements on his homestead; that he could have exchanged timber for lumber to make such improvements, but only so much as was necessary, and that if he only did this, and did it in good faith, he should be acquitted. On the contrary, that any cutting in excess of the number necessary to make his improvements would be unlawful. That he had no right to cut trees for the purpose of sale for profit, or to pay debts or loans of money, or to pay his expenses, or to buy supplies; in short, he had no right to cut them for sale for any such purpose.

Defendant was convicted, and appealed to the circuit court of appeals, which certified to this court the following questions:

1. Whether lands duly and properly entered for a homestead, under the homestead laws of the United States, are from the time of entry and pending proceedings before the Land Department and until final disposition by that Department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of Revised Statutes of the United States?

2. Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, can such citizen be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?

Mr. Justice Brown delivered the opinion of the court:

This case turns upon the question as to what are "lands of the United States" within the meaning of Revised Statutes, section 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use of the Navy. Obviously the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the Government may protect itself against an unlawful use of them. Indeed, this court has settled

by repeated decisions that the claim of a homestead or preemption entry made at any time before filing a map of definite location of a railway prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. (Kansas Pacific Railway Co. *v.* Dunmeyer, 113 U. S., 629; Hastings, &c. Ry. Co. *v.* Whitney, 132 U. S., 357; Whitney *v.* Taylor, 158 U. S., 85; Sioux City Land Co. *v.* Griffey, 143 U. S., 32.) The same principle applies where lands have been reserved for any purpose whatever. (Wilcox *v.* Jackson, 13 Pet., 498; Witherspoon *v.* Duncan, 4 Wall., 210; Newhall *v.* Sanger, 92 U. S., 761; Kansas Pacific Railway *v.* Atchison Railway, 112 U. S., 414.)

While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the Government. Upon the contrary, it was said by this court, as early as 1839, in Wilcox *v.* Jackson (13 Pet., 498, 516), that "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So in Frisbie *v.* Whitney (9 Wall., 187, 193): "There is nothing in the essential nature of these acts" (entering upon lands for the purpose of preemption) "to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the preemption law to make out any shadow of such right." In this case, the following extract from an opinion of Attorney-General Bates was quoted with approval:

> A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption, but this is only a privilege conferred on the settler to purchase lands in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government.

A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been preempted from entry or sale, though this might defeat the imperfect right of the settler. In the Yosemite Valley Case (15 Wall., 77) the construction given to the preemption law in Frisbie *v.* Whitney was approved, the court observing, page 88:

> It is the only construction which preserves a wise control in the Government over the public lands, and prevents a general spoliation of them under the pretence of intended preemption and settlement. The settler, being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises.

The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the Government, his right is only conditional and

inchoate. By the homestead act, Revised Statutes, section 2289, certain classes of persons therein specified are entitled to enter a quarter-section of land, subject to preemption at a certain price, upon making an affidavit of facts (sec. 2290) before the register or receiver, including in such affidavit a statement that "his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person." By a later act, adopted in 1891 (26 Stat., 1095), this affidavit is now required to state that the settler "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon." By section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two credible witnesses that he has resided upon or cultivated the land for such term of five years immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes. By section 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any time, the lands so entered shall revert to the Government; and by section 2301, the settler may, at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor and making proof of settlement and cultivation, as provided by law, granting preemption rights.

From this résumé of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry and until a patent is issued; second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Revised Statutes, section 2461. It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others who may wish to purchase or enter it.

With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said by

Washburn in his work upon Real Property (first edition, volume 1, page 108):

> In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminsh the value of the land as an estate.
>
> Questions of this kind have frequently arisen in those States where the lands are new and covered with forests, and where they can not be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. * * * Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he can not cut the wood for purposes of sale; it is waste if he does.

By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the Government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation.

While this question never seems to have arisen in this court before, in United States *v.* Cook (19 Wall., 591)—a suit in trover for the value of timber cut from an Indian reservation—it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was the principal, and not the incident, then the cutting would be unlawful, and the timber when cut became the absolute property of the United States. Their position was said to be analogous to that of a tenant for life, the Government holding the title, with the rights of a remainderman.

In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. (United States *v.* McEntee, 23 Internal Revenue Record, 368; United States *v.* Nelson, 5 Sawyer, 68; The Timber cases, 11 Fed. Rep., 81; United States *v.* Smith, 11 Fed.

Rep., 493; United States *v.* Storrs, 14 Fed. Rep., 824; United States *v.* Yoder, 18 Fed. Rep., 372; United States *v.* Williams, 18 Fed. Rep., 475; United States *v.* Lane, 19 Fed. Rep., 910; United States *v.* Freyberg, 32 Fed. Rep., 195; United States *v.* Murphy, 32 Fed. Rep., 376.) This general concensus of opinion is entitled to great weight as authority.

While we hold in this case that, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed the property of the settler, and, therefore, subject to taxation. (Carroll *v.* Safford, 3 How., 441; Witherspoon *v.* Duncan, 4 Wall., 210; Railroad Co. *v.* Prescott, 16 Wall., 603; Railroad Co. *v.* McShane, 22 Wall., 444; Wisconsin Ry. Co. *v.* Price County, 133 U. S., 496.)

As the land in question continued to be "the land of the United States," within the meaning of section 2461, the first question must be answered in the negative and the second in the affirmative.

CIRCULAR RELATIVE TO TIMBER ON HOMESTEAD ENTRIES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 15, 1885.

To Registers and Receivers, U. S. Land Offices,
and Special Agents General Land Office.

GENTLEMEN: The following rules and regulations are hereby prescribed by the Secretary of the Interior for the protection of the timber growing or being upon public lands covered by homestead or preemption entries; and paragraphs 8 to 10, circular of June 1, 1883, and circular of December 15, 1883, are hereby revoked.

1. Homestead or preemption claimants who have made bona fide settlements upon public land, and who are living upon, cultivating, and improving the same in accordance with law and the rules and regulations of this Department, with the intention of acquiring title thereto, are permitted to cut and remove, or cause to be cut and removed, from the portion thereof to be cleared for cultivation, so much timber as is actually necessary for that purpose or for buildings, fences, and other improvements on the land entered.

2. In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, the entryman may sell or dispose of such surplus; but it is not allowable to denude the land of its timber for the purpose of sale or speculation before the title has been conveyed to him by patent.

* * * * * * *

Respectfully,

WM. A. J. SPARKS,
Commissioner.

Approved Dec. 15, 1885:

L. Q. C. LAMAR, *Secretary.*

RIGHT OF GOVERNMENT TO TIMBER CUT ON HOMESTEADS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1896.

SIR: Your letter of April 30, 1896, is received, in which you ask, first, if a homestead entryman can, prior to making final proof, contract for the cutting and hauling away, for a consideration, of the cedar timber on his claim, the same to be cut for the purpose of clearing the land for cultivation, and manufactured into shingle bolts. And, second, if the entryman, "to swindle the contractor," should, "after it is all cut and ready to be hauled," refuse to let the contractor remove it "under the pretext" that final proof had not been made, "could the contractor have the right to take the bolts in payment for his labor," etc.?

You are informed that a bona fide entryman may cut or contract for the cutting of such timber as he wishes to have cleared in the ordinary preparation of his claim for farm purposes. The timber so cut he can sell or dispose of as he may see fit. (See enclosed copy of circular dated December 15, 1885, relative to timber cutting on lands embraced in homestead entries.)

Until patent for the claim issues to the entryman, the timber cut thereon is not his property exclusively. The Government has reversionary rights in the lands, and, in the opinion of this office, the timber cut thereon may not be appropriated or levied upon in satisfaction for any claim which another may hold against the entryman.

The contractor can not, therefore, appropriate the timber or bolts to which you refer in satisfaction for his claim for labor performed thereon. He has his remedy in the local courts, and can there redress his grievance growing out of violation of contract.

Very respectfully, S. W. LAMOREUX,
Commissioner.

Mr. JOSEPH N. CARLSON,
Silver Lake, Cowlitz County, Wash.

PUBLIC-TIMBER PRIVILEGES OF SETTLERS ON UNSURVEYED LANDS.

A bona fide settler upon unsurveyed public land who intends to acquire title to the land under the homestead laws so soon as he is allowed to do so after survey, and who, in good faith, is complying with the rules and regulations relative to residence, cultivation, and improvements, is permitted the same privileges with regard to the cutting of timber upon his claim as are allowed to the bona fide homesteader, and is subject to the same restrictions.

TIMBER ON INDIAN HOMESTEADS.

The rules and regulations governing the use of timber on lands covered by Indian homesteads are the same as those set forth in circular of December 15, 1885, quoted on page —, with the exception that the restrictions respecting the use of timber remain in force for a period of twenty-five years subsequent to the issuing of trust patent, inasmuch as the title to the land (and, hence, to the standing timber as a part of the realty) acquired under such patent remains inalienable until the expiration of that period, or longer, when the United States is discharged of its trust.

TIMBER ON INDIAN ALLOTMENTS AND INDIAN RESERVATIONS.

[19 Op., 232.]

DEPARTMENT OF JUSTICE,
Washington, January 26, 1889.

SIR: By your letter of the 21st of January, 1889, you ask—

1. Whether an allottee under the act of February 8, 1887 (24 Stat., 388), possesses the right to cut and sell merchantable timber, whether pine or hard wood, standing upon the lands allotted to him, and held under the trust patent by which the title is reserved for twenty-five years or longer to the United States.

2. If such allottees possess the right of sale to any extent, is the Department authorized to exert any control over the disposition of the property, except when the land still remains within an Indian reservation within its jurisdiction under the statute?

The Indians, when organized as tribes under the former policy of the Government, have been treated as domestic dependent nations under the guardianship of the United States. That their condition would be made better if, instead of their separate national organization, with the nomadic and improvident habits incident to it, they were severally qualified, as speedily as possible, for self-reliant citizenship in the several States and Territories and endowed with political rights, is shown to be the conclusion reached by Congress, which inspired the passage of the act to which you refer. The act is intended to change the wandering, improvident, and semi-civilized hunter to the domestic, industrious, and enlightened citizen. The first step adopted to promote this end is to give to each Indian a home, with a sense of ownership. The act contemplates that these homes shall, in the first instance, be agricultural. The first industries are to be farming and grazing, as shown by the first section of the act, for the land to be allotted is to be such as is "advantageous for agricultural and grazing purposes." In this contemplated new mode of life the guardianship which heretofore has been exercised over the tribe is to be transferred to the individual allottees provided for in the act. The separate manhood of each Indian is to be recognized, but still subject for a time to the care and supervision of the Government as trustee or guardian. The real estate falling to each allottee is not intended to be used during the period of the guardianship for

speculative purposes, but is so conditioned that in their period of wardship and tutelage the Indians shall not be subject to the danger of entering into an unequal competition with the whites in the field of traffic and general business outside of agriculture and grazing. The fifth section of the act provides for two different patents to be given to each allottee for the same land. The first is to be—

> Of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such patent is located.

The second is—

> That after the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust and free of all charge or encumbrance whatsoever.

Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years or longer the obligation exists to see that the intent of the law shall be faithfully carried out, and no unlawful waste committed either by the cestui qui trust or anyone else. During that period the land is intended to be used for agricultural and grazing purposes. Whatever timber may be necessarily cut or used for the promotion of these purposes the trustee should permit. To sell the timber growing on the land, or to cut it for sale for commercial purposes, except such as may be cut in clearing the land or for improvements to be erected thereon, would be inconsistent with the obligation of the trustee to preserve and protect the trust. And the ruling in United States *v.* Cook (19 Wall., 591) would seem to meet this question. The opinion rendered by me July 21, 1885, to the Secretary of the Interior on the question of *leasing Indian lands for grazing purposes* in its logic reaches this proposition.

Your first inquiry is therefore answered, that the allottee does not possess the right to cut and sell merchantable timber, except such as it may be necessary to cut in clearing the land for agricultural or grazing purposes, or to erect suitable buildings thereon.

To your second inquiry I reply that by virtue of the legal title remaining in the Government, and the trust relation assumed by it until the second patent is granted, it is the duty of the Department to prevent the cutting of timber except for the purposes above indicated, whether the land is or is not within an Indian reservation.

Very respectfully,

A. H. GARLAND,
Attorney-General.

The SECRETARY OF THE INTERIOR.

See "Timber unlawfully cut on Indian lands" (19 Op., 710), cited on page 45.

See also United States *v.* Cook (19 Wall., 591), cited on page 47.

LANDS VALUABLE CHIEFLY FOR TIMBER NOT SUBJECT TO INDIAN ALLOTMENT.

DEPARTMENT OF THE INTERIOR,
Washington, December 30, 1895.

SIR: I transmit herewith copy of a communication of the 24th instant from the Commissioner of Indian Affairs, and accompanying applications, made by Louis Mishler, a Chippewa Indian, for allotments of lands for himself and his four minor children.

As the papers show that the lands in question are more valuable for timber than either agricultural or grazing purposes, and therefore not subject to allotment, said applications are rejected, and you will cancel the same and take such other steps in the premises as may be proper.

Please notify the Commissioner of Indian Affairs of the action taken by your office.

Very respectfully, HOKE SMITH,
Secretary.

COMMISSIONER OF THE GENERAL LAND OFFICE.

BURNED TIMBER ON HOMESTEAD ENTRIES IN WISCONSIN, MINNESOTA, AND MICHIGAN.

[Act of January 19, 1895; 28 Stat., 634.]

AN ACT for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan.

Whereas during the summer and autumn of eighteen hundred and ninety-four extensive forest fires prevailed in northern Wisconsin, Minnesota, and Michigan, resulting in the death of many homesteaders and their families, the destruction of their property and effects, and of much of the green timber growing upon them, which homesteads are valuable chiefly for the timber standing and growing on them; and

Whereas under existing law homesteaders are not allowed to cut or sell green or burned timber, except for the purpose of clearing and improving, and all burned timber not cut within a short period will become worthless and a loss to the settler and the Government: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all such persons actually occupying homesteads in said States of Wisconsin, Minnesota, and Michigan, at the time of such fires, upon claims under the laws of the United States, on lands of the United States, whose property and buildings were destroyed by such fires, and the heirs of all such persons who perished by such fires, and all persons who by reason of such fires and loss of property were obliged to leave their homesteads, are hereby granted two years' additional time in which to make final proof. And temporary absence for any period within two years from the date

of this act shall be deemed constructive possession and residence, but shall not be deducted from the time required to make final proof.

SEC. 2. That all persons whose property was destroyed by such fires, and the heirs of all persons who were actual occupants of the homesteads at the time of the fire, and who lost their lives in and by that fire, may, by proving such actual occupancy at the date of such fires, make proof showing compliance with the law up to the date of the fire, and shall make payment at the minimum price under existing statutes, in the same manner as if such claimants were alive, and upon receipt of such proof of loss of property by such fires, or death of the claimant, heirs surviving, and upon payment as aforesaid, a patent shall be issued to such claimant, or his or her heirs.

SEC. 3. That the claimant upon any homestead, who by reason of not having lived thereon the necessary length of time to enable him to commute under section twenty-three hundred and one of the Revised Statutes as amended by the act of March third, eighteen hundred and ninety-one, his heirs, executor, administrator, or guardian of his minor heirs, may, when the quantity of timber destroyed upon his or her homestead shall not exceed seventy-five thousand feet of merchantable green timber, file an estimate in the land office where such homestead was entered with such reasonable proofs as the Commissioner of Public Lands may prescribe, as to the quantity of timber destroyed upon any sectional subdivision, and thereupon the register and receiver may, under the direction of the Commissioner of Public Lands, issue a license or permit to cut the burned timber on any homestead or sectional fraction thereof, upon payment of the sum of one dollar and twenty-five cents per acre for such sectional subdivision, and the Government shall issue a patent for the same to the claimant or his or her heirs.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 2, 1895.

Registers and Receivers, United States District Land Offices, in Wisconsin, Minnesota, and Michigan.

GENTLEMEN: Your attention is called to the act of Congress, approved January 19, 1895, entitled "An act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," a copy of which is hereto attached.

The first section provides for an extension of time of two years within which to make final proof, and excuses temporary absence for any period within two years from the date of the act in all cases where any homestead settler, in your respective districts, was compelled to leave the land settled upon by him because of the prevailing forest fires of the summer and autumn of 1894, and by reason of the destruction of buildings or other property by such fires. The same relief is extended

to the heirs of any settler who perished by such fires. Any settler desiring to receive the benefit of these provisions will be required to file in the district land office having jurisdiction over the land embraced in his or her claim an affidavit corroborated by two parties setting forth the number of the entry, if one has been made, and the description of the land; the date of settlement upon the land; the amount and character of the improvements placed thereon; the character and extent of the damage to the settler's property caused by the fire; the date when the same occurred; whether or not the party was thereby obliged to leave the claim, and such other facts as may be relied upon as bringing the party within the scope of the act. Where a homestead settler perished by such fires, the heirs (i. e., the successors to the right under the homestead law, if they desire to receive the benefit of the provisions of said section), or one of them, will be required to furnish evidence consisting of the affidavit of the respective claimants, or, if a minor, of his or her guardian, corroborated by two witnesses, setting forth the number of the entry, if one has been made, and the description of the land; the date of the settlement under which they claim; the character and value of the improvements, and the circumstances attending the death of the settler. The affidavits of the claimant and his corroborating witnesses may be made before any officer authorized to administer oaths using a seal.

Upon receipt of the required affidavits you will forward the same to this office, with your joint recommendation in regard to the case. Should the evidence be found satisfactory you will be so advised, whereupon you will make such notes upon your records for your future guidance as will indicate that the parties are entitled to the benefits of the provisions of the first section of the act, and in these cases you will not issue the usual notice of the expiration of time within which to make proof until *ten* years from the date of the entry, and no contest for abandonment or noncompliance with the law will be allowed against any of the entries until after the expiration of two years from the date of the act. Entrymen temporarily absent for any time within two years from the date of the act will not be required to show any additional period of residence when they make *final* proof, because of such absence, as the act explicitly directs that such absence shall be deemed constructive residence.

Parties coming under the act whose claims rest upon settlement alone are not relieved from the necessity of making their original homestead entries as heretofore required by the law and regulations in order to protect their settlement rights.

The second section provides that homestead settlers whose property was destroyed by such forest fires, or in case the settler perished by the fire, then his or her heirs, or, in other words, the successors to his or her homestead right, as defined in section 2291, Revised Statutes, may upon satisfactory proof of compliance with the law upon the part

of the settler, to the date of the fire, and, upon payment of the minimum price under existing statutes, receive a patent for the land embraced in the claim of such settler. The procedure in such cases, where the original entry has been made, will be the same as is now required in making homestead proof, except that compliance with the law need be shown only to the date of the fire, and, in addition, proof will be required as to the date of the forest fire and the extent of the damage done to the claimant's property thereby, or, where the settler has perished by the fire, proof as to the time and manner of his death. The payment required to be made for the land is the "minimum price under existing statutes," which in ordinary commutation of homestead entries under section 2301, Revised Statutes, is $1.25 per acre, except where the lands are within the limits of railroad land grants and thereby enhanced in price to $2.50 per acre, and in other cases such amount as is required by any special laws which may govern the disposal of the specific tracts of land.

You will make no change in your method of reporting these entries, but will be governed in each case by the instructions heretofore issued, should there be any entries embracing land of a special character.

In all cases where parties intend to avail themselves of the benefit of the said second section under claims resting upon settlement alone at the time of the fire, they will be required, when they apply to make the original entry, if such application is not made within three months of the date of the settlement, to file affidavits explaining why such entry had not been made sooner, and when parties whose entries have been made since the date of the fire submit proof, as herein required for the purpose of perfecting title to their claims, under the provisions of the said section, you will forward the proof submitted to this office for consideration and withhold the cash certificate until advised that such proof is satisfactory to this office.

Section 3 provides for cases in which the forest fires only partially burned the timber on the homestead, and the settler may desire to purchase only a portion thereof, retaining the remainder to be perfected under the general provisions of the homestead laws.

In such cases, and when the quantity of timber burned does not exceed 75,000 feet of merchantable green timber, the entryman may file with the register and receiver of the district in which his claim lies a sworn statement setting forth the fact that the timber on his claim was destroyed or injured by the forest fires during the summer and autumn of 1894, giving a description of his entry, the date and number thereof, and a description of each of the smallest legal subdivisions of his claim upon which the green timber has been injured or destroyed by said fires, together with an estimate of the amount of such timber so injured or destroyed upon each of said smallest legal subdivisions. Also that he has complied with the requirements of the homestead law up to date. This statement must be corroborated by two witnesses

who have actual knowledge of the conditions existing on the claim. The entryman must designate which of the legal subdivisions of his claim on which the timber was burned he desires to purchase under this act, and with his application to purchase and sworn statement above required he must tender the necessary amount of money to complete the purchase at the minimum price per acre.

Upon the presentation of the above-required application and sworn statement, together with the purchase money, if the same be found satisfactory to the register and receiver, they shall thereupon issue the ordinary cash entry certificate and receipt, giving them current numbers in the regular cash series. On the margin of the certificate, receipt, and duplicate receipt there shall be indorsed in red ink: "Burned timber entry, act of January 19, 1895."

On the back of the duplicate receipt there shall be indorsed the following license or permit to cut the burned timber:

The within-named entryman having complied with the regulations prescribed under the act of January 19, 1895, entitled "An act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," is hereby permitted to cut and dispose of the burned timber on that portion of his homestead entry described in this duplicate receipt.

Date.....

.....
Register.

.....
Receiver.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH, *Secretary.*

TIMBER FELLED BY STORM ON CERTAIN HOMESTEAD ENTRIES IN FLORIDA.

[Act of February 26, 1897; 29 Stat., 599.]

AN ACT Concerning certain homestead lands in Florida.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons actually occupying homesteads in good faith in any of the following-named counties, in said State of Florida, to wit, Alachua, Lafayette, Levy, Suwannee, Bradford, Baker, and Columbia, at the time of the storm on or about September twenty-ninth, eighteen hundred and ninety-six, are hereby granted the right to sell or otherwise dispose of the fallen timber on their homestead entries felled by said storm, and to devote the proceeds of such sale or barter to the improvement of their homesteads or support of themselves or their families.

TIMBER ON SCHOOL LANDS.

[11 Copp's Land-Owner, 134.]

SCHOOL SECTIONS—PUBLIC LANDS—TRESPASS.

School sections in the Territories are public lands, though reserved, and are under the control of the United States. Suits for damages against trespassers thereon may be brought in the local courts by United States officials.

Secretary Schurz to Hon. John Eaton, Commissioner of Education, August 18, 1879.

I have received your letter of the 5th instant, inclosing a letter from Hon. W. H. Beadle, superintendent of public instruction for Dakota Territory, dated Mapleton, Dakota, the 15th ultimo, in relation to depredations being committed upon sections 16 and 36 in said Territory, by cutting and removing timber therefrom, and also by cultivating the same for crops as private property.

Mr. Beadle desires to be informed whether sections 16 and 36 in each township of surveyed lands in said Territory are public lands, or whether they are "so under Territorial jurisdiction as to enable us to bring actions in favor of our public-school fund." Section 14 of an act entitled "An act to provide a temporary government for the Territory of Dakota and to create the office of surveyor-general therein" reads as follows:

> And be it further enacted that when the land in said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same. (12 Stat., 239.)

The lands are public lands, although reserved for a particular purpose, and all trespass committed upon them renders the parties guilty of such trespass liable to prosecution under the laws of the United States.

The penalties, however, collected for trespass, would not inure to any school fund of the Territory.

The United States has not granted the title to such lands, but has reserved them in order that at some future time, when a State shall be erected out of such Territory, the same may be granted to such State.

In relation to the right of the United States to prosecute for trespasses, I think there can be no question.

Section 2461, Revised Statutes, provides specifically the punishment for cutting and removing timber from the public lands; and while I am not aware of any statute which provides for a rule of damages for using and cultivating lands of the United States which can not, under law, be sold, still I am of the opinion that the United States has the right to recover *mesne profits* for the use of said land.

In the case of Cotton *v.* United States (11 Howard, 239) the Supreme Court says:

> Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property in the State court or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have.

In the case of the United States *v.* Gear (3 How., 120), it was held that the United States had the right to maintain an action of trespass for taking ore from lead mines. On the same principle I think the Government would be entitled to recover for any other beneficial use to which the public lands might be put. You may, therefore, advise Mr. Beadle that if he will furnish this Department with information as to the cutting and removing of timber from sections 16 and 36, or any other public lands in the Territory of Dakota, giving a description of the tract trespassed upon, and time when trespass was committed, the same will receive prompt attention. You may also advise him that if he will furnish to this Department like information of persons who are cultivating and using such sections, that proper action will be taken thereon.

BOXING TREES ON PUBLIC LANDS FOR TURPENTINE PURPOSES.

All boxing and chipping of trees for turpentine purposes on public lands, whether vacant or covered by unperfected homestead entries, is unlawful.

The use of trees for such purposes on lands covered by unperfected homestead entries can not be considered as constituting such "cultivation" as is contemplated in the second section of the act of May 20, 1862, which has clearly in view the tilling or fertilizing of the soil.

The decisions rendered in the cases of James F. Bailey, J. C. Calhoun, and E. S. Taylor, tried at the April (1888) term of the circuit court, eastern district of Louisiana, established the right of the Government, in cases of turpentine trespass on public lands, to bring criminal proceedings for the stealing and retaining of personal property of the United States, to wit, crude gum, etc., under section 5456 of the United States Revised Statutes, and 18 Stat., 479.

The further right to sue for the recovery of damages in cases of this nature is established by the decision rendered in the following case:

UNITED STATES *v.* TAYLOR.

Circuit court, southern district of Alabama (35 Fed. Rep., 484).

PUBLIC LANDS—TRESPASS—RIGHT OF GOVERNMENT TO SUE—POSSESSION—HOMESTEAD.

> Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the Government of possession or title, so that it can not maintain an action of trespass for cutting timber on the land.

PUBLIC LANDS—BURDEN OF PROOF.

In an action brought by the United States for trespass committed on Government lands, the burden of proof is on the Government to show that the acts of trespass complained of were committed by defendant or by his command, or that they were done for his benefit, or with his knowledge and consent, and were subsequently ratified by him.

* * * * * * *

SAME—EVIDENCE.

In such a case, evidence that the employés of defendant, under his direction or superintendence, or that of his partner for their joint benefit, entered on the lands described in the complaint and cut turpentine boxes in the trees thereon, or chipped such trees for turpentine purposes, or removed therefrom crude turpentine, is sufficient to warrant a verdict against defendant. But if defendant merely bought turpentine from homestead claimants, having nothing to do with hiring hands, or chipping trees, or dipping or hauling turpentine, further than to pay for this work at the request of said claimants, and deducting the amount so paid from the agreed price of the turpentine, defendant is not liable.

SAME—NOMINAL DAMAGES.

In such a case, merely entering on the land and cutting boxes or chipping trees, and removing therefrom crude turpentine, entitles plaintiff to nominal damages, though no actual damages were done.

SAME—COMPENSATORY DAMAGES.

In an action for cutting growing trees, if their value can be ascertained without reference to the value of the soil on which they stand, the measure of damages is the injury done them, and not the difference in the value of the land before and after such injury.

SAME—EXEMPLARY DAMAGES.

In such a case the Government is entitled to exemplary damages, if the going on the land and cutting and chipping the trees, or dipping and removing the turpentine was done by defendant wilfully, or if such acts were the result of a negligence so gross as to show wilfulness or a reckless indifference to the rights of the Government.*

* * * * * * *

TOULMIN, J. (charging jury):

This suit is called an action of trespass, and is brought by the United States against the defendant to recover damages for trespasses alleged to have been committed by him in the years 1883 and 1884, on lands specifically described in the complaint, and belonging to the Government of the United States. The United States charges the defendant with the trespass set forth in the complaint. He says he is not guilty of it. Under the plea of not guilty the Government must be prepared to prove the commission by the defendant, his servants, employés, or agents of the trespass of which it complains. It must be proved that the acts of trespass complained of were done by the defendant, or by his command, or that they were done for his benefit and with his knowledge and consent, and he subsequently adopted and ratified them.

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*As to when exemplary damages may be allowed, see Clarke *v.* Improvement Co., ante, 478, and note; Railroad Co. *v.* Roberts (Ky.), 8 S. W. Rep., 459, and note; Railroad Co. *v.* Arnold (Ala.), 4 South Rep., 359; Webb *v.* Gilman (Me.), 13 Atl. Rep., 688, and note; Railway Co. *v.* Garcia (Tex.), 7 S. W. Rep., 802; Haines *v.* Shultz (N. J.), 14 Atl. Rep., 488; White *v.* Stribling (Tex.), 9 S. W. Rep., 81, and note.

It is not required that the acts of trespass should be proved beyond a reasonable doubt, as in a criminal case. This is a civil suit, and all that is required is that you should be reasonably convinced from the evidence in the case that the defendant is guilty. The plaintiff's case should be satisfactorily proved. It is not necessary that the proof should be conclusive, but must be such as to reasonably convince you. If your judgments are thus convinced, after applying the ordinary tests for the ascertainment of truth, it would be your duty to find a verdict against the defendant. If your judgments are not thus convinced, it would be your duty to return a verdict of not guilty.

Now, to enable a party to maintain an action of trespass, he must have either actual or constructive possession of the land trespassed on at the time of the trespass. Constructive possession is such as the law annexes to the title, and will authorize this action. It is undisputed that the United States had the title to the land described in the complaint at the time of the alleged trespass. But it is contended on the part of defendant that the United States were not in such possession of the homestead lands mentioned in the complaint as to entitle them to bring this suit; that the occupancy of said lands by the homesteaders spoken of in the trial gave them the possession, and deprived the United States of the right to bring this particular suit; and it is further contended by the defendant that the receipts of the receiver of the land office, issued since this suit was brought, and which are submitted in evidence, divested the United States of the title to such homestead lands, and vested it in the homestead claimants, and that, for that reason, the United States are debarred from recovering, so far as the homestead lands are concerned.

I charge you that the right of the homesteader is one of occupancy only, but with certain rights and privileges, subject to the right and duty of the Government to protect and preserve the timber on the land. He is not in adverse possession of the land until he is vested with the title to it by the Government. In the meantime he has the privilege of clearing it for cultivation, and of cutting the timber down for that purpose, and such timber may be sold if not needed for improvements; but if sale and traffic is the only reason for cutting the timber on the land, or for removing any material therefrom, the law would be broken, and the person would be a trespasser. Hence I charge you that the United States had, when this suit was brought, and now have, such possession as entitles them to maintain this action; that the receipts of the receiver of the land office are not, of themselves, sufficient evidence that the Government's title has been divested, and that it has vested in the homestead claimants. Until they have made the final proof and acquired the title, that is, so fulfilled their obligations under the law as to entitle them to patents, it is not allowable to them to cut the timber on the lands, or take any crude turpentine or other material therefrom for the purpose of sale or speculation. The certificate of the

receiver and register would be sufficient evidence of their right to a patent, and would be a defense to this action so far as the homestead lands are concerned; but the receiver's receipt alone is not sufficient.

Any person who cuts or removes timber or other material, or who hires others to cut or remove timber or other material, or who incites or induces others to cut or remove timber or other material from Government land, for his personal benefit or advantage, or for the purpose of gain (except he has the right or permission to do so from the Government), is a timber trespasser upon Government lands. And any person who commits timber trespass upon Government land is liable to civil suit for the value of the material taken and the damages sustained by the cutting of the timber. Now, gentlemen, if you believe from the evidence that the employés of the defendant entered on the lands described in the complaint, or any of them, and cut turpentine boxes in the trees on such land, or chipped such trees for turpentine purposes, or removed therefrom crude turpentine, and this was done by his direction or superintendence, or by that of his partner for their joint benefit, it would be your duty to find him guilty in this suit. If he had the right or permission from the Government to do so, it devolves on him to show it. But, if you believe from the evidence that the defendant's arrangement with the homesteaders was simply to buy the turpentine from them, he having nothing to do with having the hands hired, or the trees chipped, or the turpentine dipped, or hauled from the land, further than to pay for this work at the request of the homesteaders, for and on their account and at their request, deducting the amount so paid from the agreed price of the turpentine, then he would not be liable in this suit as a trespasser on the homestead land.

The evidence before you, and which you are to consider, is both of a positive and circumstantial character, and as a part of this evidence you have a statement in writing of what it is admitted certain absent witnesses would testify if they were present. This admission is that, if the witnesses were personally present, they would testify to the facts stated. This statement of the facts the witnesses would prove stands in the place, and is the substitute for the oral testimony the witnesses would give if personally present. The witnesses being personally present, the evidence given by them would be subject to contradiction, and the substitute for that evidence is equally open to contradiction. There is some conflict of evidence in this case. It is your duty to reconcile it, if you can, so as to make all the witnesses speak the truth. If you can not do this, if you find it impossible to harmonize the testimony, then it is for you to say which you will believe and which you will disbelieve, which you will accept as true and act upon and which you will reject. In determining this question you will look at the other facts and circumstances as shown by the evidence, and see which of the witnesses has been corroborated or sustained by these facts and circumstances; what interest they have, or what motives actuate them in testifying one way or

the other; what means and opportunities they had of knowing what they have testified to. Now, when you have considered all these things, you say where the truth is; for you, gentlemen, are the exclusive judges of the sufficiency and weight of the evidence in this case. You say what weight you will give it, both positive and circumstantial, and whether it is sufficient to reasonably satisfy you that the defendant had turpentine boxes cut or trees chipped on the lands described in the complaint, or any of them, and had removed therefrom the crude turpentine; and it would be equally a trespass if he entered on the land and chipped trees and removed therefrom crude turpentine which accumulated in boxes which had been before cut in the trees by other persons, if you should find from the evidence that there were any such.

Now, if you believe from the evidence that the defendant's employés entered on the lands described in the complaint, or any of them, and cut boxes in the trees thereon, or chipped the trees, and removed the crude turpentine therefrom, nominal damages would be recoverable, even though no damage in fact was done. The theory of a suit like this is that the breaking of the "close" (as it is called) is the cause of action. Breaking into the close of another means an unauthorized intrusion into the land of another, and this will authorize nominal damages in any event; and any injury to the timber on the land, either by boxing or chipping or any removal of crude turpentine therefrom merely enhances the damages, and all damages which naturally result from the wrongful act, and are directly traceable thereto, are recoverable. In an action for damages in cutting growing timber or trees the recovery is not limited to their actual value for firewood, turpentine purposes, or for timber or lumber purposes, but the actual injury to the estate by the cutting of the trees; and in determining the question it is proper to show the purpose for which the trees were designed and could have been used. If the trees, although they are part of the realty, have a value which can be accurately measured and ascertained without reference to the soil on which they stand, the recovery may be of the value of the trees destroyed (if any were destroyed), or of the injury done to them, and not for the difference in the value of the land before and after such injury. You determine the value of the trees after cutting and working, with reference to the peril to which they were then exposed from fire, ravages of worms, or decay, caused or traceable to the trespass of the defendant, if he committed any. The inquiry is, What is the amount of injury which the Government has suffered from the whole trespass taken as a continuous act?—going on the land, cutting the trees, chipping them, and removing the crude turpentine therefrom, during the years 1883 and 1884.

Now, it is claimed here that the Government is entitled to more than actual damages; that exemplary damages, or "smart money," as it is called, should be given. If the going on the land and cutting and chipping the trees, or the dipping and removing of the turpentine, was

done by the defendant wilfully, or was the result of negligence so gross as to show wilfullness or a reckless indifference to the rights of the Government, you may, in your sound discretion, go beyond the boundary of mere compensation for the injury done and award exemplary damages. Now, gentlemen, take the case. Ascertain from the evidence what the truth is as to the guilt or innocence of the defendant, and as you find that truth so let your verdict be. And if you find the defendant guilty, say by your verdict what damages the Government is entitled to recover from him for the injury done.

Special Agent R. A. Vancleave to Commissioner General Land Office, November 28, 1888.

In the United States court for the southern district of Mississippi, November term, 1888, * * * His Honor Judge R. A. Hill ruled in the cases tried at this term of said court as follows:

When the purchaser bought crude gum with a knowledge of the trespass, he was liable for the manufactured value without deduction for the expense of manufacturing. That an innocent purchaser of crude gum, without knowledge of the trespass, from a wilful trespasser is liable only for the value of the crude gum at the time of the purchase, and that the price paid by said purchaser is the amount the Government is entitled to recover.

INJURY, PRESENT AND PROSPECTIVE, INFLICTED UPON TREES BY "BOXING," ETC.

[4 L. D., 1.]

In determining the amount of damages resulting from "boxing" trees for turpentine, the injury, present and prospective, inflicted upon the trees should be included.

Acting Secretary Muldrow to Commissioner Sparks, July 1, 1885.

I am in receipt of your letter of the 15th of June last, inclosing report of Special Agent Griffin, dated June 4, 1885, relative to the matter of the measure of damages in case of trespass by "boxing" trees upon the public land for turpentine.

For years past the Department has at intervals been called upon to examine into cases of turpentine trespass presented for its action, and has, as a general rule, recommended suit for the recovery of the value of the material taken. Experience, however, clearly shows that such action has entirely failed to accomplish the suppression of such unlawful operations. Parties against whom judgments have been obtained have continued to violate the law even upon an enlarged scale, defying the agents of the Government to their faces, and other parties in the immediate vicinity have entered upon the work of destruction, in no way deterred by the punishment previously visited upon their neighbors.

The report of Agent Griffin, full and explicit as it is, simply corroborates the information already received from other sources, that a pine forest, when used as a "turpentine orchard," is doomed to entire destruction. A "box" or gash is cut into the side of a tree, perhaps 10 inches wide and 6 inches deep, and of such a shape as to catch and retain a considerable quantity of the crude turpentine gum. The next year another "box" is cut at another point in the circumference of the tree, and so on. Besides this, the tree is subjected to a "chipping" process, the bark being cut through down into the woody portion for 12 or 18 inches above the upper edge of the "box," in order to keep a fresh bleeding surface continually exposed. In four or five years the life of the tree is exhausted. Even should the process of "boxing" be discontinued decay will ensue from the action of the weather and worms upon the portion of the wood already exposed. There can be no healing process and no future growth to a pine tree once tapped by the turpentine gatherer's ax. Drippings of gum accumulate in the "boxes" and about the root of the dying tree. From the carelessness of some traveler or from lightning striking some tree in the forest fires originate and the entire timber is consumed. After its destruction the land will be covered in a few years with a growth of worthless scrub oaks, rendering it entirely valueless.

In view of these considerations I concur in your opinion that the measure of damages heretofore estimated in such cases, based upon the value of the material procured, is insufficient to indemnify the Government for the actual loss resulting from the boxing of trees for turpentine; and you are hereby authorized and directed to assess upon depredators of this class hereafter a measure of damages which shall include the injury, present and prospective, inflicted upon the trees which have been subjected to the operation.

TIMBER UPON ACCRETIONS THAT ARE PUBLIC LANDS.

Accretions formed by washing or recession become part of the lands they adjoin.

Removing timber from accretions that are public lands, except for improvement of the same or other domestic use, is trespass upon such lands, and liable to punishment as such. (See 1 L. D., 596.)

TIMBER FOR RAILROAD PURPOSES.

[Act of March 3, 1875; 18 Stat., 482.]

AN ACT granting to railroads the right of way through the public lands of the United States.

Be it enacted, &c., * * * That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles

of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; * * *

* * * * * * *

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

By the above act all duly organized right-of-way railroads are authorized to take timber from the public lands adjacent to the line of the road for construction purposes. All land-grant railroads are likewise authorized, in the several granting acts, to take timber from the public lands adjacent thereto for construction purposes. The act of September 29, 1890 (26 Stat., 496), forfeited the grants to all uncompleted railroads to the extent of the grants for the unconstructed portions of such roads.

No authority is granted to take public timber for use as fuel or for repairs, except in the case of the grant to the Denver and Rio Grande Railway Company by the act of June 8, 1872 (17 Stat., 339), which allows the taking of public timber for purposes of repair on the portion of the line constructed thereunder.

Under these acts timber can only be taken from public lands for railroad purposes by the railroad companies direct, through their contractors or duly appointed agents.

No timber may be taken from public lands for the purpose of selling the same to a railroad company. No railroad company is authorized by the above acts to procure or cause to be procured timber from public lands for sale or disposal either to other companies or to the general public.

LANDS ADJACENT, &c.

STONE *v.* UNITED STATES.

Circuit court of appeals, ninth circuit (64 Fed. Rep., 667).

* * * * * *

RAILROAD COMPANIES—CONSTRUCTION OF ROAD—RIGHT TO TIMBER ON ADJACENT PUBLIC LANDS.

Act of March 3, 1875 (18 Stat., 482), which grants to railroad companies the right of way through public lands and the right to take from the public lands "adjacent to the line of said road" timber necessary for its construction, does not authorize the taking of timber for the construction of a road from public lands 50 miles distant from the road.

See also United States *v.* Henry Hazlett, cited on page 85.

UNITED STATES *v.* LYNDE ET AL.

Circuit court, district of Montana (47 Fed. Rep., 297).

PUBLIC LANDS—NORTHERN PACIFIC RAILROAD—RIGHT TO CUT TIMBER FOR CONSTRUCTION.

Act Congress, section 2 (13 Stat., 365), granting to the Northern Pacific Railroad Company "the right, power, and authority * * * to take from the public lands adjacent to the line of road material of earth, stone, timber, etc., for construction thereof," was not intended to apply only to public lands contiguous to or adjoining the line of the road, but may extend to other lands.

SAME—USE OF TIMBER ON ANY PART OF LINE.

Timber taken from lands adjacent to the line of the railroad may be used for construction upon any part of it.

UNITED STATES *v.* DENVER & R. G. RY. CO.

SAME *v.* DENVER & R. G. R. CO. AND OTHERS.

District court, district of Colorado (31 Fed. Rep., 886).

PUBLIC LANDS—GRANT OF MATERIALS TO RAILROAD COMPANIES.

Defendant, a railroad company, was empowered by special act of Congress to take timber from the public lands adjacent to its right of way, for the repair and construction of its road, with the proviso that the road should be built to a certain point within a certain time. Defendant, having forfeited its rights under the special act, continued to take timber; and upon being sued by the Government for the value of the timber taken after such forfeiture, justified its action under the provision of a subsequent general act of Congress giving railroad companies generally a right of way over public lands, and the privilege of taking material therefrom for the construction of their roads. *Held*, that the two acts were not inconsistent, and that the defendant, having enjoyed the bounty of the special act, was not thereby disqualified from claiming the privileges granted by the general law.

SAME—ADJACENT PUBLIC LANDS.

Under the provisions of the special act of Congress of June 8, 1872 (17 Stat., 339), and of the general act March 3, 1875, the defendant railroad company was authorized to take from the public lands "adjacent" to the line of its road the timber and other material necessary for the construction and repair of its railway. *Held*, that the language used was intended to indicate such timber and other materials as could be conveniently reached by ordinary transportation by wagons, and that the privilege granted did not include the right to take timber from public lands, and transport it by rail to distant parts of the road, for use in construction and repairs.

PUBLIC LANDS—ACTION OF TRESPASS—BURDEN OF PROOF.

In an action of trespass by the Government against a railroad company, for cutting timber upon public lands, the burden is upon the Government to show that the timber was taken from public lands. That it was taken from public lands "adjacent" to defendant's road and used at a point authorized by the statute granting the privilege of taking it is a matter of defense peculiarly within the knowledge of the defendant, and in the absence of evidence to that effect plaintiff is entitled to judgment.

HALLETT, J.:

In these actions the Government sues for the value of timber taken from public lands, and defendants justify the taking under certain acts of Congress. The facts as to the alleged trespasses are not in dispute; the matter for consideration is the proper construction of the acts of Congress. In the year 1870, defendant in the first suit, the Denver and Rio Grande Railway Company was incorporated under a general law of the Territory of Colorado relating to corporations, and afterwards built the road and operated it until sometime in the year 1886, when the property was sold under foreclosure proceedings to a new company—defendant in the second suit and the present owner. In this discussion the old company will be called the *railway* company and the new company the *railroad* company, as their names differ only in these words.

June 8, 1872, Congress granted to the railway company "the right of way over the public domain * * * and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line." The act is one section, and subject to a proviso:

> That said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void as far as respects the unfinished portion of said road. (17 Stat., 339.)

By act of March 3, 1877 (19 Stat., 405), the term mentioned in the proviso was extended to ten years. The road was not completed to a point on the Rio Grande as far south as Santa Fe within the ten years limited by the act, and it may be assumed that, except as to the road built within that time, the grant came to an end June 8, 1882. On behalf of the railway company, it was suggested in argument that the proviso quoted above relates only to the next antecedent, a clause conferring on the company the right to condemn lands in a manner specified in an earlier act of Congress; but it is not necessary to waste time on that point. The proviso was inserted to enforce diligence on the part of the company, and its meaning is not doubtful. The trespasses alleged in each of these actions occurred after June 8, 1882, and except in so far as the timber taken was used in repairing the road built before that date the act of June 8, 1872, can have no application or effect. And as to timber so used for repairs, we shall presently consider whether it was taken from lands adjacent to the right of way, within the meaning of the act of 1872.

In general, the trespasses complained of are justified under another act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" (18 Stat., 482). By this act the right of way through the public lands, and the right to take timber and other material from lands adjacent, is granted "to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad." As to the right of way over public lands, and the right to take timber and other material from adjacent lands for constructing the road, the act is substantially the same as the act of 1872.

On behalf of the Government it is contended that defendants, having enjoyed the bounty of a special act for the time limited therein, can claim nothing under the general law. The argument is that by the act of 1872 Congress gave to the railway company all that was asked for or intended to be given; and to allow more under a later act is to disregard the limitation of the first act. This view, however, is not in accordance with the language of the act and the circumstances attending its passage. Numerous grants of similar character had been made to many different companies, and to some of them large tracts of public land had been given. Congress was much beset by other companies for like favors, and it is reasonable to believe that the act of 1875 was intended to take the place of special acts like that of 1872, which were then common in the legislation of Congress. In this view the act of 1875 is not inconsistent with earlier acts on the same subject, but supplemental, limiting or extending the earlier acts, according to its terms. In Railway Co. *v.* Alling (99 U. S., 463) it was so applied to the act of 1872, and they were allowed to stand together.

So, also, the language of the act, in general, confers the privileges therein mentioned upon all companies who may wish to build on the public lands, not excluding any. It seems to be broad enough to embrace companies which have enjoyed the privileges of other acts, and in respect to new lines constructed by such companies equally with others which have not been so favored. If, however, the right of the railway company, and of the railroad company as its successor in interest, to take timber from public lands under the acts of 1872 and 1875 be recognized, a more difficult question is presented as to what are adjacent lands within the meaning of these acts.

The parties agree in each case that the timber was cut from lands adjacent to the line of railway, as it was then or afterwards constructed, and have been careful to state whether the timber was taken from lands

adjacent to the line built before or after June 8, 1882. The timber in controversy in the first suit was cut from lands near the town of Montrose, in Montrose County, between October 1, 1882, and November 1, 1883. Some of it was taken to Utah Territory for the use of the Denver and Rio Grande Western Company, and a small quantity was used in building cars. The remainder was appropriated to bridges, buildings, and other permanent structures on the road, but the location of such a structure with reference to the place from which the timber was taken is not stated. The second action is for timber cut in Gunnison County between January 1 and November 1, 1886. It was made into ties, one-fourth of which have been used for repairs on lines built prior to June 8, 1882, one-fourth for new switches and side tracks along the line of road completed subsequent to June 8, 1882, and one-half for a new line now in process of construction between Montrose and Ouray.

As in the other case, it appears that a considerable part has been carried to a place remote from the place of cutting, and the location of the remainder with reference to the place of cutting is not stated. Obviously, the questions of fact were prepared with a view to present the question concerning the right of defendant to take timber from public lands under the act of 1875, which has been sufficiently discussed in this opinion; and, whether the timber was taken under the act of 1872 or that of 1875, the same question is presented as to the right of the company to use it anywhere on its line. In other words, whether the timber must be used on a place adjacent to that from which it was taken, or may be used in any place to which the company can carry it.

Nothing has been said in defense of the railway company's act in taking timber from lands adjacent to its line for the use of another company in the Territory of Utah, and it may be assumed that nothing will be attempted in that direction. And the question whether under the act of 1875 timber could be taken for use on the road built under the prior act of 1872, and whether under the act of 1875 timber could be taken from lands adjacent to the road built, under the prior act, is subordinate to that last stated, and which is now to be considered. If, as claimed by defendants, all timber on public lands adjacent to the line of road may be used on any part of the line, it is plain that the grant is of all the timber so situated; for with lines extending through mountains scantily furnished with timber and plains with none whatever, it is obvious that the company will have use for all on any part of its lines. As defined in its certificate of organization, the lines of the Denver and Rio Grande Railway Company were more than 2,500 miles in length, of which perhaps one-half were in regions destitute of timber. Something over 1,200 miles of these lines have been built. If all the timber which can be said to be adjacent to the lines so constructed is subject to appropriation throughout their entire length not much remains for other uses. With us, and perhaps generally elsewhere, railroad corporations may be organized under general laws

without limit as to number or length of road; and, as we have seen, all of them can take from public lands timber for building their roads, according to the act of 1875. Under the construction given to that act by defendants, the time is not distant, perhaps it is at hand, when all accessible timber in the State would be subject to appropriation by these corporations.

The word "adjacent" seems to be of flexible meaning, and to depend very much upon the context and the subject-matter to which it may be applied for its proper effect. As used in these acts, and with reference to the lands which may be taken for stations, side tracks, etc., it has the sense of contiguous or adjoining, while in the preceding paragraph, and with reference to material for building the road, it is claimed, and with reason, that it should have the larger sense of nearness without actual contact. In a standard dictionary an illustration of the larger meaning of the word is given in this form: "Things are *adjacent* when they lie near to each other, without actually touching, as adjacent fields, adjacent villages," etc. It seems unreasonable to say that in this connection the word refers to the Government subdivisions lying next the right of way, and if we should so declare it would be difficult to point out what subdivisions are meant.

Accepting the larger meaning of the word, the right to take timber from public lands, under these acts, extends laterally some distance from the right of way, and probably within ordinary transportation by wagon. If, however, this is the adjacency referred to in the acts of Congress, shall the beneficiaries of those acts be allowed to establish another by means of the very structure which they are authorized to build? Having constructed a part of their road, shall they then say that all places so connected are adjacent to each other? I am unable to accept that view. In railroad parlance, things widely separated may be pretty near together, but it is not so in the ordinary use of language. In my judgment, the acts of 1872 and 1875 contemplate the use of material from public lands while the road is in process of construction, and afterwards for repairs under the act of 1872, within such convenient distance from such lands as may be reached by ordinary transportation by wagons, and not otherwise. The use of the road in carrying such materials to points distant from the place of taking is not within those acts. For timber taken from public lands and carried to points remote from the place of taking, whether used by defendant corporation or by others, defendants are liable in trespass for the value.

As before stated, it appears that a considerable part of the timber in controversy was carried a long way from the place of taking, and, as to the remainder, the place of using is not shown. On that point the burden of proof is upon defendants. The Government was bound to prove, in the first instance, a fact admitted in these cases—that the timber was taken from public lands. With that fact established, whether the use made of it was such as the law authorizes is a matter peculiarly

within defendant's knowledge, and usually beyond the reach of inquiry by the Government. In such case, whether the proposition be affirmative or negative, the burden is upon the party having such knowledge (1 Whart. Ev., sec. 367). In the absence of evidence to show that the timber was used in a place adjacent to that from which it was taken, plaintiff is entitled to judgment.

Another question which is perhaps presented in the record as to the right of the railroad company, organized in 1886, to take timber for repairs under the act of 1872, was not discussed at the bar, and has not been considered; and several questions relating to the use made of the timber have not been reached, and are not decided.

The judgment in each case will be for the plaintiff for the amount specified in the statement of facts.

DENVER & R. G. R. CO. *v.* UNITED STATES (two cases).

Circuit court, district of Colorado (34 Fed. Rep., 838).

PUBLIC LANDS—LICENSE TO RAILROADS TO CUT TIMBER.

Act Congress June 8, 1872 (17 Stat., 339), granted to the D. & R. G. R. Co. the right to take stone, timber, etc., from public lands for the construction and repair of its railway, provided it was completed within five years from its passage; and in case of default the act was to be null and void as to the unfinished portion of the road. This act was amended to change the five years to ten. By act Congress March 3, 1875, a general grant to railroads was made similar to the special grant of the act of 1872, except that it limited the right to material to that necessary for the construction alone. *Held*, that the D. & R. G. R. Co. was entitled to the privileges of both acts.

SAME—PLACE OF USE.

Where a railroad has the right to take timber from the public lands adjacent to its right of way to use for purposes of construction, it can take timber so obtained to any point of the line, however distant from the place of cutting.

SAME.

For the rights granted under the general act of 1875, the portions of the D. & R. G. R. R. built before and after June 8, 1882, are to be treated as one road, and timber can be taken from the entire line for the construction of any portion of the line provided for in the original organization.

SAME—PURPOSES OF USE.

Under these acts, section and depot houses, snowsheds, and fences are a part of the railroad.

SAME—REPAIRS.

Under these acts, no timber can be taken from the public lands for the repair of any portion of the D. & R. G. R. Co.'s tracks not completed before June 8, 1882, and for that portion only from the lands adjacent thereto.

SAME—ADDITIONS.

After a railroad line is once completed it has no right under act Congress March 3, 1875, to take timber from the public lands to build new switches and side tracks.

Error from district court, district of Colorado; Hallett, judge.

The United States, plaintiff, sued the Denver and Rio Grande Railroad Company and others, defendants, in two suits, for cutting timber

illegally on the public lands. Judgment for plaintiff, and defendants bring error. Both suits were consolidated.

BREWER, C. J.:

These two cases come here on error from the district court, judgments having been rendered there in favor of the United States and against the plaintiff in error for the full amounts claimed. Each case was tried on an agreed statement of facts. On June 8, 1872, Congress passed an act making a grant to the Denver and Rio Grande Railway Company (17 Stat., 339). The material portion of that grant is as follows:

That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns: * * * *Provided*, That said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

Subsequently this proviso was changed so as to give ten years instead of five (19 Stat., 405). On March 3, 1875, Congress passed an act making a general grant "to any railroad company duly organized under the laws of any State or Territory," etc., which grant, for all questions that arise in this case, is similar to the special grant to the Denver and Rio Grande, except that in the general grant the right to take material, earth, stone, and timber is limited to what may be necessary for the construction, and not, as in the special grant, for construction and repairs.

The agreed statement of facts in the first case is as follows: That it is agreed—First, that the timber sued for in said action was cut by William A. Eckerly & Co., as agents for the Denver and Rio Grande Railway Company, and delivered to said railway company. Second, that the attached statement correctly shows the kinds and amounts of timber so cut and delivered, and also shows the time of cutting, the purposes for which it was cut and used, and the prices paid for cutting and delivering the same. Third, that said timber was cut in Montrose County, Colo., and near the town of Montrose, and upon public, unoccupied, and unentered lands of the United States. Fourth, that the lands from which the timber was cut were along and near and adjacent to the line of railway of said company. Fifth, that the portion of the line of railway through said county of Montrose, and in the vicinity of said town of Montrose, was not constructed or completed until after June 8, 1882, and that on June 8, 1882, said line of railway was only constructed and completed as far westward of Cebolla, in Gunnison

County, Colo. Sixth, that said company had not completed its line of railway to Santa Fe on June 8, 1882, nor has it ever so completed it. Seventh, that of the timber cut as aforesaid a part was used on portions of the line of railway out to Grand Junction, constructed and completed after June 8, 1882, and for the purpose of construction of railway, erection of section and depot houses, snowsheds, fences, etc., and a part was shipped by the Denver and Rio Grande Railway for similar purposes to the Denver and Rio Grande Western Railway, to be used in the Territory of Utah, as shown in attached statement; and $1,000 worth was used for repairs on portions of road completed prior to June 8, 1882. Eighth, that as to all of its line of railway constructed after June 8, 1882, the said company strictly complied with all the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." Ninth, that upon the foregoing agreed statement of facts the following questions are to be submitted to the court for decision: (*a*) Whether under the act of June 8, 1872, and an act of March 3, 1877, amendatory thereof, the Denver and Rio Grande Railway Company had a right to cut timber for any purposes on public land of the United States adjacent to portions of its line of railway constructed and completed after June 8, 1882. (*b*) What are "adjacent" lands within the meaning of the act of Congress, approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," and the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?" (*c*) Whether under said acts said company could cut timber on public lands of the United States adjacent to the portions of the line of railway completed subsequently to June 8, 1882, to be used for purposes of repair and for station and section houses, and for fences and snowsheds on those portions of said railway line constructed and completed prior to June 8, 1882. (*d*) Whether under such statutes said railway company could cut timber from public lands adjacent to portions of the line of railway completed after June 8, 1882, to be used for any purposes on portions of the line of railway constructed and completed after June 8, 1882, and, if so, for what purposes? (*e*) Whether the terms of the statute giving said railway company the right to take timber "for the construction and repair of its railway lines" would in anywise comprise and comprehend the erection, building, and repair of section and depot houses, snowsheds, fences, and rolling stock. (*f*) Had the said railway company the right, under the act of March 3, 1875, to take from adjacent public lands material, earth, stone, and timber necessary for the construction of its railroad? (*g*) To what extent and for what amount the Denver and Rio Grande Railway Company is responsible for timber cut as aforesaid and shipped to Utah for use on the Denver and Rio Grande Western Railway. (*h*) To what extent and for what

amount said railway company is liable, if at all, upon the above agreed statement of facts and upon the law as it shall be decided by the court. Tenth, that this case is a test case to obtain a definite and positive adjudication by a court of competent jurisdiction of the various points set out above and of the rights of said railway company with regard to cutting timber from public lands under the act of June 8, 1872, under the amendatory act of March 3, 1877, and under the act of March 3, 1875. Eleventh, that judgment shall be entered by the court upon the foregoing statement of facts, and upon the law as it shall decide it, and at a valuation for said timber as set out in the annexed statement. Twelfth, that the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to consider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent—whether half a mile or ten miles. I certainly do not agree with the idea which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands—land fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

The first question is whether the railroad company can avail itself of both the special act of 1872 and the general grant of 1875. It was held by the district judge that it could, and I agree with him in that conclusion. It is unnecessary to do more than refer to the opinion filed by my brother Hallett for sufficient reasons for his conclusion. The principal question, however, is this: My brother Hallett was of the opinion that the place of use of the timber on the line of the railway was to be considered as well as the place of cutting in determining the rightfulness of the appropriation by the company. He thought that the right to cut timber extended to only so much timber as should be used in the construction of the road opposite, or nearly so, to the place of cutting; that if timber should be cut within a half mile of the road, and then carried on the cars of the company a hundred miles, and there used in the construction of the road, it could not be said to be taken, within the purview of the act, from adjacent lands. So he concluded that the right to take timber was limited by the place of use, and that, as each section of the road of reasonable length was completed, the right to

take timber on lands adjoining such section was gone. In other words, the grant of timber was exhausted pari passu with the construction of the road. In this view, with all deference to the learned judge, I think he was mistaken.

While grants of this nature are to be strictly construed, they are to be fairly construed, and so as to carry into effect the intent of the grantor. In determining what is granted, we of course look first to the language used. Now, in these grants the place of cutting, as well as the use to which the timber cut may be put, are both expressed. The place is the public lands adjacent to the line of the road. The use is the construction of the railroad, not a part of the railroad, but of the railroad as a whole, and of course including therein every part of it. It does not purport to grant the right to take timber from adjacent public lands for use in the construction of the railroad opposite the place of cutting, and these last words will have to be implied in order to place the limit on the grant given to it by the district judge. It would have been so easy to use such words of limitation that their omission makes strongly against an intent of such limitation. Let me make an illustration. Suppose the owner of a section of land made a grant to a railroad company of a strip 50 feet in width through his land for a right of way, and by the same instrument granted to the company the right to take stone and earth from land near this right of way for the purpose of constructing its road. This would be precisely parallel to the case at bar, the difference being only one of size. Now, would it be contended that under such a grant the company was limited for each rod of distance to the stone and earth which might happen to be opposite such rod? Would not a fair and reasonable construction, one expressing the intent of the grantor, be that the company could take stone and earth from any place which was near to the right of way for use in the construction of any part of the road through the section? If that would be true in the lesser illustration, would it not also be true in the larger case before us? Can it be that Congress intended to aid in the construction of only a part of the railroad? It must have known that there were large extents of territory in this Western country treeless and without suitable stone for culverts and bridges. Did it mean to aid in the construction of such parts of the road as ran through a timber country, or where there was suitable stone, and leave the company unaided in the construction of other parts? It seems to me both the language of the statute and the intent of the grantor are against the views entertained by my brother Hallett.

But, beyond this, the decision of the Supreme Court in the case of U. S. *v.* Railroad Co. (98 U. S., 334), seems to me decisively against those views. In that case the facts were these: By the nineteenth section of the act of July 2, 1864, there was granted to the railroad company, for the purpose of aiding in the construction of its road, every alternate section of public land (except mineral land), designated by

odd numbers, to the amount of 10 alternate sections per mile on each side of the road on the line thereof not reserved, etc. By the twentieth section, whenever 20 consecutive miles were completed and accepted patents were to be issued to the company for land on each side of the road to the amount designated. It was contended that this grant was to be measured by the separate sections of 20 miles of road, and that, to fill out the grant, land must be taken opposite each section, respectively. But the court ruled otherwise, and held that the grant was in aid of the construction of the road as a whole, and might be filled out by lands anywhere along the line. I quote the language of the opinion:

> The position that the grant was in aid of the construction of each section of 20 miles, taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the company was not to receive patents for any land except as each 20 miles were completed. The provision allowing it to obtain a patent then was intended for its aid. It was not required to take it; it was optional for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of 20 miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road without reference to any particular section of 20 miles. When lateral limits are assigned to a grant, the land within them must, of course, be exhausted before land for any deficiency can be taken elsewhere; and when no lateral limits are assigned the Land Department of the Government, in supervising the execution of the act of Congress, should undoubtedly, as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond 20 miles from the road, the land opposite to any section of the road has been taken up by others, and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road.

This sustains me in the construction I place upon these grants, that only two things are necessary in determining the rightfulness of the appropriation of timber: First, that it be taken from public lands adjacent to the line of road; and second, that it be used in the construction of the road. This disposes of substantially all the questions in the case. One or two minor matters remain for notice.

As appears from the agreed statement of facts, a part of the road was completed before June 8, 1882, the time limited by the special act and its amendment, and a portion has been constructed since. For convenience I shall call the first part the old line and the latter part the new line. Now, the special right given by the special act—that is, the right to take timber for repairs—is by the proviso specifically limited to the old line, so that no timber can be taken from lands adjacent to it for repairs on the new line, and, conversely, none from land adjacent to the new line for repairs on the old. Again, for the rights granted under the general act both the old and the new lines are to be taken as parts of one road, so that timber can be taken from any part of the entire line

for the construction of any part of the road provided for in the original organization. Again, I think there can be no doubt that section and depot houses, snowsheds, and fences are properly to be considered, in the purview of the act, a part of the railroad.

I have not hitherto noticed the agreed statement of facts in the second case, for the matters that I have been considering disposed of every question in that case except that which arises upon the eighth paragraph, which is "that one-fourth of said timber has been used in the construction of new switches and side tracks along the line of road completed subsequent to June 8, 1882;" and that presents the question whether this timber was used in the construction of the railway. On the one side it is claimed that this refers to repairs, new switches, etc., being in lieu of old switches, etc. On the other hand it is claimed that this means absolutely new switches, etc.; that is, switches, etc., where there were none before. I think it immaterial which is the meaning. Of course, if repairs, it was unlawful, because upon the new line; and if, on the other hand, absolutely new switches and side tracks, they were upon a line of road already completed, so that they were merely additions, extensions, and improvements. The grant does not extend to these matters, but is exhausted when the line is once completed. Of course we all know that the developments of the country and increase of business will require constant additions—new depots, section houses, switches, and side tracks. The demand for these will never be exhausted, but will continue as long as the surrounding country increases in population and business. Now, the grant was not intended to aid in supplying these successive demands. It was to aid in the first construction, and when that was completed the grant was exhausted. So, in either event, this appropriation of timber was unlawful.

Of course the supply of timber for other roads was not within the contemplation of the act.

This disposes of all questions in the case. From the views above expressed, it follows that the judgment of the district court in each case must be modified. In the first case judgment will be entered in favor of the Government for the amount of timber shipped to the Utah lines, and for the $1,000 worth of timber cut on land adjacent to the new lines for repairs on the old; and in the second place judgment will be for the one fourth which was used in the construction of new switches and side tracks.

UNITED STATES *v.* DENVER AND RIO GRANDE RAILWAY COMPANY.

Error to the circuit court of the United States for the district of Colorado (150 U. S., 1).

After the expiration of the time limited by the act of June 8, 1872 (17 Stat., 339, ch. 354), for the completion of its road to Santa Fe, if not before that time, the Denver and Rio Grande Railway Company was entitled to claim the benefit of the act of March 3, 1875 (18 Stat., 482, ch. 151), upon complying with its conditions.

The act of March 3, 1875 (18 Stat., 482, ch. 151), granting a right of way to railroads through the public lands, and authorizing them to take therefrom timber or other materials necessary for the construction of their roadways, station buildings, depots, machine shops, side-tracks, turn-outs, water stations, etc., permits a railway company to use the timber or material so taken on portions of its line remote from the place from which it is taken.

In its ordinary acceptation and enlarged sense, the term "railroad" includes all structures which are necessary and essential to its operation.

While it is well settled that public grants are to be construed strictly as against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given.

General legislation, offering advantages in the public lands to individuals or corporations as an inducement to the accomplishment of enterprises of a quasi public character through undeveloped public domain should receive a more liberal construction than is given to an ordinary private grant.

It is not decided that the act of March 3, 1875, gave a right to take timber from the public domain for making rolling stock; nor what structure, if any, not enumerated in that act, would constitute necessary, essential, or constituent parts of a railroad.

SEATTLE, WASH., *October 12, 1893.*

SIR: I have the honor to acknowledge the receipt of your letter of October 5 * * * concerning my request of July 18, 1893, for reinvestigation of timber trespass case against Chatteroy Lumber Company.

* * * * * * *

On the trial it was proved that the timber was all cut from lands within 2 miles of the line of the road. The court instructed the jury that the word "adjacent" used in the act, under the evidence in that case, meant anywhere within 5 miles of the line of the road.

* * * * * * *

I am, very respectfully, your obedient servant,

WM. H. BRINKER,
United States Attorney.

COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

RAILROAD RIGHT OF WAY—GRAVEL BED—CONSTRUCTION.

GREAT NORTHERN RY. CO.

[14 L. D., 566.]

Assistant Attorney-General Shields to the Secretary of the Interior, May 13, 1892.

The use of material under the general right-of-way act of March 3, 1875 (18 Stat., 482) and the special act of February 15, 1887 (24 Stat., 402) is limited to construction, and does not include the repair or

improvement of a railroad. The period of original construction ceases when the road is open to the public for general use.

(This opinion was adopted by the Secretary of the Interior May 17, 1892.)

RAILROAD COMPANIES CAN NOT PROCURE TIMBER FROM PUBLIC MINERAL LANDS UNDER THE ACT OF JUNE 3, 1878 (20 STAT., 88).

The act of June 3, 1878 (20 Stat., 88), authorizing the cutting of timber for building, agricultural, mining, and other domestic purposes, from public lands which are known to be mineral and not subject to entry under existing laws of the United States except for mineral entry, expressly provides that "the provisions of this act shall not extend to railroad corporations."

Railroad companies can not, accordingly, take timber from public mineral lands for any of the purposes enumerated in said act.

This prohibition does not, however, operate to interfere, in any wise, with their taking timber from such lands for the purposes allowed in the act of March 3, 1875 (18 Stat., 482), and the several land-grant acts authorizing railroad companies to take public timber for construction purposes.

UNITED STATES *v.* EUREKA & P. R. CO.

Circuit court, district of Nevada (40 Fed. Rep., 419).

PUBLIC LANDS—TIMBER—CUT FOR USE BY RAILROAD COMPANY.

The defendant, a railroad corporation, purchased for use upon its locomotives and cars wood severed from the public mineral lands. *Held,* that such purchase and use were unlawful, and that the United States could recover from defendant the value of the wood so severed and purchased by it.

THE UNITED STATES *v.* O. A. DODGE ET AL.

District court, first judicial district, Nez Perces County, Idaho Territory.

GENTLEMEN OF THE JURY: The defendants are charged with wilfully and unlawfully cutting and removing certain timber from the lands of the United States.

I instruct you that the timber growing upon the lands of the United States is a part of the land and the property of the United States, and no person has the right to cut such timber and appropriate the same to his own use without some express provision of law authorizing him to do so.

Some evidence has been introduced tending to show that certain preemption claims had been located upon the land from which the timber is alleged to have been cut.

I instruct you as a matter of law that a preemptor has no right to cut and remove the timber from his claim except for the purpose of preparing the same for cultivation, and no one has the right to purchase

timber removed from a preemption claim which the preemptor cut for purposes other than the preparation of the claim for cultivation and for the residence of the preemptor. If a person do so he is a trespasser, and if he do so, knowing that it has been cut off from the land for the purpose of sale merely and not the genuine purpose of improving the claim his trespass is wilful.

To explain more fully, if a preemptor having a claim covered with timber desire to build a house or a fence he may cut timber from any part of such claim suitable for such purposes. So if he desire to plow and seed 20 acres, he may cut and remove all the timber on said 20 acres, and may sell the wood or logs cut therefrom; so he may do from the whole claim if he wishes to cultivate the whole; but he is not at liberty to cut and remove timber from any part of said land simply as a matter of converting the same into money before he has paid for it and not in good faith for the purpose of improving his claim and preparing it for cultivation. If he do so, the preemptor so cutting the timber is a trespasser, and if others buy it of him, knowing the facts, they also are trespassers and liable for the value of the timber.

I further instruct you that in case of such a trespass the fact that the United States afterwards patented said land to other persons does not relieve those committing the trespass from their liability for their wrongful acts in cutting the timber.

It is the policy of the Government to preserve the timber growing upon such of the public lands as are fit for cultivation for the use of those who shall settle upon and purchase it.

There are, however, some portions of the public domain which are more valuable for the mineral that is in the soil than for agricultural purposes. Such lands are called mineral lands, and the Government does not sell them except in small quantities for mining purposes.

From this mineral land any person may cut and remove the timber for domestic purposes.

The defendants claim that the timber in question was cut from mineral lands for domestic and other lawful purposes. I instruct you that in actions of this kind, when a person is proven to have cut timber from the public domain, the law holds him liable for the value of such timber unless he shows in defence that he cut the same under such circumstances as authorized him to do so under the laws of the United States.

In this case the defendants claim that the land is mineral land. By mineral lands is meant such land as is more valuable for mining than for agricultural purposes, and the burden of proving its mineral character devolves upon the defendants; so also is the burden on the defendants of proving that they cut the same for domestic or other lawful purpose. It is also claimed by defendants that the timber cut was for the use of the Northern Pacific Railroad, and used in the construction of said road. I instruct you that the Northern Pacific Railroad during the period of its construction had the right to so much of the timber upon the public lands adjacent to it as was needed to construct it.

If the defendants took a contract from said railroad to furnish a certain bill of lumber, and in pursuance to said contract they cut the timber in question, they would be justifiable in doing so. If, however, they had a sawmill and lumber yard, and sold lumber to the railroad company as they did to the general public, without said lumber having been specially procured for their use, such purchase would not excuse defendants from their liability for lumber cut on the public domain.

If the railroad company notified defendants, either verbally or in writing, that they desired lumber of a certain description for their road and they procured such lumber for them, such an order from the company filled by defendants would justify them cutting the same from the public domain, but it would not excuse their going beyond the orders and stocking a lumber yard for commercial purposes generally from timber cut from the public domain.

In considering whether this timber was cut for the railroad company the question of whether the land is mineral or nonmineral is not important, as under the charter of the road they might cut from either.

The first question, then, is: Did defendants cut or cause others to cut or purchase the timber of others who unlawfully cut it?

Second. Was the land from which the timber was cut mineral lands?

Third. If the defendants cut the timber, or purchased it from others having cut it, was it cut for the Northern Pacific Railroad, or for domestic purposes?

If you find that the defendants cut or purchased the timber, and they themselves testify that they did purchase a certain amount, and that they did so for the railroad company, under the instructions that I have given you you ought to find for the defendants.

If you find from the evidence that the defendants cut or purchased the timber from those who cut it, and that said cutting was wrongful, you ought to find for the plaintiff and determine the amount cut and the value of it.

In determining the value, if you find that defendants acted in good faith, without intending to defraud the Government, but supposing they had a right to buy it, you should find the value of it to be the same as it was immediately before it came into their possession.

If you find that the defendants bought the logs of another who wrongfully cut them, knowing that they were wrongfully cut, you should find the damage to be the value of the logs after they were converted into lumber.

TIMBER ON LANDS WITHIN LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

UNITED STATES *v.* WILLIAM CHILDERS.

District court, district of Oregon (8 Sawyer, 171).

GRANT TO THE NORTHERN PACIFIC RAILWAY COMPANY.

By the act of July 2, 1864 (13 Stat., 365), the odd-numbered sections along the line of the Northern Pacific Railway Company for 40 miles on either side of the line in the Territories, and 20 miles in the States, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any 25 miles of said road is constructed and accepted by the United States; and in the meantime the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against anyone that unlawfully cuts timber thereon.

NORTHERN PACIFIC R. CO., *v.* HUSSEY.

Circuit court of appeals, ninth circuit (61 Fed. Rep., 231).

RAILROAD LAND GRANTS—UNSURVEYED LANDS—TENANTS IN COMMON.

A land-grant railroad company is not a tenant in common with the United States in respect to lands which lie within its grant limits, opposite the completed line, but which have not yet been surveyed, so as to render the odd sections belonging to the company distinguishable from the even sections reserved to the Government.

SAME—ENJOINING TRESPASSERS.

The company has, however, such an interest in the lands as will entitle it to maintain alone (the Government having refused to join with it) a suit to enjoin trespassers who are cutting timber from the lands in such manner that the denuded portions will fall within the odd as well as the even sections when the survey is made.

UNITED STATES *v.* ORDWAY AND OTHERS.

Circuit court, district of Oregon (30 Fed. Rep., 30).

PUBLIC LANDS—CUTTING TIMBER—ACTION FOR DAMAGES—PARTIAL DEFENSE.

A partial defense to an action or in mitigation of the damages claimed therein ought to be pleaded in the answer as a distinct defense; and an allegation that the defendants cut and removed certain timber from alleged public land, believing that it was the land of the Northern Pacific Railroad Company, from which they had a license, is such a defense, where the damages claimed in the complaint are based, not only on the value of the timber in the standing tree, but also the value bestowed on the same in converting it into lumber and putting it into market.

SAME—GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

The grant of certain odd sections of the public lands to the Northern Pacific Railway Company, by the act of July 2, 1864 (13 Stat., 365), does not give the corporation any such present right to, or interest in, any one of such sections as authorizes it to waste the same by disposing of the timber thereon before it is earned by the construction of the section of the road adjacent and opposite thereto. (The case of the U. S. *v.* Childers, 8 Sawy., 171, 12 Fed. Rep., 586, distinguished from Buttz *v.* Northern Pac. Ry. Co , 7 Sup. Ct. Rep., 100, and followed.)

PUBLIC LANDS—EARNED LANDS.

On the construction and acceptance of any section of the road of the Northern Pacific Railway Company, the coterminous odd sections vest absolutely in the corporation, and thereafter the patent therefor may be considered as having issued.

UNITED STATES *v.* ORDWAY AND OTHERS.

Circuit court, district of Oregon (30 Fed. Rep., 36.)

DEADY, *J.:*

This case was argued and submitted with the foregoing one. It is alleged in the complaint that on May 1, 1883, and divers days since, the defendants cut and removed from the public lands of the United States, to wit, the west ½ of section 13 of township 3 north, of range 9 east, of the Willamette meridian, situate in Washington Territory, 600 trees, and cut the same into cord wood, to wit, 3,000 cords, of the value of $7,500, and wrongfully converted the same to their own use, to the damage of the plaintiff, $7,500. The defenses are similar to those made in the foregoing case, to wit: Denials; a license from the Northern Pacific Railway Company; and the cutting was done in good faith. In the second defense it is alleged that the premises are within the limits of the grant to the Northern Pacific on the line of its general route between Portland and Wallula Junction, and that acting under a license from said corporation they cut and removed from said half section not more than 1,800 cords of wood, of no greater value when standing in the tree than 10 cents a cord.

The demurrer to the defenses of good faith is overruled, and sustained to that of license from the Northern Pacific.

RAILROADS CONSTRUCTED FOR PRIVATE USE NOT ENTITLED TO USE PUBLIC TIMBER.

In constructing a railroad not for use and benefit of the general public, but for private use, the entering upon public lands and destroying timber thereon in the clearing of a right of way, and in digging, grading, and excavating for a roadbed, the defendants held to be guilty of trespass, and the United States clearly entitled to recover damages from them. * * *

The judge in his charge to the jury affirming "that it was agreed by both great parties that the public lands and the timber thereon must be protected for the future as well as the present generation." (See Land Office Report for 1889, p. 291; case of U. S. *v.* O. S. Burdett and A. Rosenfield, eastern district of Louisiana, Judge E. C. Billings, May term, 1889.)

USE OF PUBLIC TIMBER BY TELEGRAPH COMPANIES.

[Act of July 24, 1866; 14 Stat., 221.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of

any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may preempt and use such portions of the unoccupied public lands subject to preemption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

* * * * * * *

SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

PROCURING WOOD FROM PUBLIC LANDS FOR USE OF MILITARY POSTS.

DEPARTMENT OF THE INTERIOR,
Washington, August 9, 1886.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant transmitting a copy of a letter, dated the 1st ultimo, from Joel R. Slack, who made a contract with the Government for delivering at Whipple Barracks, Ariz., 1,000 cords of wood, under the supposition he would be allowed to cut the wood from the public lands; a copy of notice to Slack from T. M. Bowers, special agent of the General Land Office, to desist from cutting wood on the public domain, and requesting in accordance with the recommendation of the Quartermaster-General, that "authority be given to cut wood on vacant lands of the public domain for the use of the Army," and stating, in passing, the remark of the chief quartermaster of the Department of Arizona, "that unless the wood required to supply the army on the frontier can be cut by contractors on vacant public lands belonging to the United States it will be an expensive item in that department to the Army."

There is no objection to allowing wood to be taken from the public domain for the use of the Army, under proper regulations, when circumstances render it necessary. The decision by the Court of Claims in the case of Nannie Spencer, administratrix of Warren Faver, grants this, and says that "the proper officers might lawfully employ individuals to cut wood from the public land for the use of the military

force so situated;" but the decision adds, "in such case the persons so employed would be paid, not for the wood, *but for cutting and hauling it.*"

As requested in your communication, permission is granted to cut wood on the public domain convenient to Whipple Barracks for the use of said post in accordance with the decision of the Court of Claims herein referred to; but the persons furnishing the wood should be paid for its cutting and delivery alone, and not for the value of the timber, as that belongs to the United States.

Very respectfully, L. Q. C. LAMAR,
Secretary.

The SECRETARY OF WAR.

FOREST RESERVATIONS.

[Act of March 3, 1891; 26 Stat., 1095.]

* * * * * * *

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land, bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

CIRCULAR OF INSTRUCTIONS RELATING TO TIMBER RESERVATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 15, 1891.

To Special Agents of the General Land Office.

GENTLEMEN: Your attention is hereby called to section 24 of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," which reads as follows:

SEC. 24. That the President of the United States may from time to time set apart and reserve, in any State or Territory having public lands bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

To carry into effect said provisions it becomes important to reserve all public lands bearing forests, or covered with timber or undergrowth, on which the timber is not absolutely required for the legitimate use and necessities of the residents of the State or Territory in which the lands are situated, or for the promotion of settlement or development of the natural resources of the section of the State or Territory in the immediate vicinity of the particular lands in question.

In so doing it is of first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.

For the purpose of securing the necessary data upon which to base recommendations for such forest reservations, the following instructions are issued:

Special agents, upon being detailed to secure the data in question, will proceed, without undue delay, to make in the districts assigned to them a thorough and careful personal examination of the public lands bearing forests or covered with timber or undergrowth, and ascertain by personal observation and by interviews with Government and State officials in the vicinity of such lands, and with citizens who have an interest in the public welfare, all facts pertaining to the value of said forests or timber lands for all uses, purposes, and requirements. The result of such investigations should be duly made the subject of report to this Office.

In submitting such reports a recommendation should be made in each case as to whether the lands described should be set apart as a public reservation, setting forth in full the reasons for arriving at the conclusions stated. The agent should also in every instance, so far as practicable, procure and submit with his report the expression of opinion in writing of the officials and citizens interviewed by him relative to the special value of each tract or area of land reported upon.

In recommending reservations of timber lands, special agents should describe such lands by natural drainage basins; and whenever it is in the interests of the industries carried on in the district to except any lands within said basins from reservation by permitting the timber to be cut to meet the wants of the people, such excepted tracts should be described in Land Office terms, as sections, townships, ranges, etc.; but when surveys have not been extended over the lands thus excepted, the lands should be described by natural boundaries in such a manner that they may be readily distinguished from other lands, and that proper provision for their survey by Land Office methods may be made.

After making an examination of the timber lands of any drainage basin and having decided to recommend the same for reservation under the provisions of this circular, before submitting report in the matter a notice should be prepared by the agent stating that such recommendation will be made to the General Land Office and setting forth a description of the basin, together with a description of any public lands embraced therein, which it may be proposed to have excepted therefrom.

It should also be stated therein that the object of such publication is to give timely notice of the proposed reservation in order that all parties interested who either favor or oppose its establishment may be afforded due opportunity to submit their views to this office, by petition or otherwise, for the purpose of having the same considered prior to the final establishment of such reservation. This notice should be posted in the land office or offices of the district wherein such lands are situated, and a copy of the same should be published at least once a week for three successive weeks in some newspaper published in the county, or each of the counties, wherein such lands are situated, and also in at least one other newspaper of general circulation in the State or Territory. If no newspaper be published in the county or counties in which the lands are situated, then the publication should be made in a newspaper published in the county nearest to such lands.

A printed copy of the notice of publication should be submitted with the agent's report, together with the affidavit of the publisher or foreman of each newspaper attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

Should knowledge be acquired by the agent that any particular tract or tracts of public timber land are being, or are likely at an early day to be, despoiled of the timber which should be preserved for climatic, economic, or other public reasons, and that the early reservation thereof is necessary, the agent should report the matter at once to this office describing in general the location of said lands, and stating reasons for believing that necessity exists for early action. Should the services of a surveyor be required to locate and define by proper exterior bounds and lines any tract or tracts therein which should be excepted from reservation, he should submit an estimate as to the total cost of such survey and the time required to complete same. Upon receipt of such report proper measures will be promptly taken by this office in the premises.

Very respectfully,

T. H. CARTER, *Commissioner.*

Approved:

GEO. CHANDLER, *Acting Secretary.*

The following notice was prepared for posting on lands within forest reservations:

NOTICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 14, 1894.

Public notice is hereby given that these lands are set apart and reserved as a forest reservation, by proclamation of the President of

the United States, under authority of the act of Congress of March 3, 1891.

This reservation is made for the benefit of the adjoining communities, being created to maintain a permanent supply of water for irrigation and of wood for local use by a rational protection of the timber thereon.

All persons are hereby warned not to settle upon, occupy, or use any of these lands for agricultural, prospecting, mining, or other business purposes, nor to cut, remove, or use any of the timber, grass, or other natural product thereof, except under such regulations as may be hereafter prescribed.

No person shall start or kindle, or allow to be started or kindled, any fire in the timber, grass, or undergrowth on these lands, or commit any other waste thereon; and the driving, feeding, grazing, pasturing, or herding of cattle, sheep, or other live stock within this reservation is strictly prohibited.

Bona fide settlers having properly initiated their claims prior to the withdrawal of the lands for said reservation, and actual owners of lands within the reserve, may pass to and from their claims or property, but will not be allowed to occupy or use lands within the reservation outside of their claims, nor to use, damage, or destroy any timber or other natural product of such lands.

Any person violating these regulations will be prosecuted for trespass, and will be held responsible pecuniarily for any waste or damage whether done intentionally or caused by neglect.

All law-abiding citizens are requested to report any cases of trespass upon said forest reserve that may come to their knowledge, and to assist in the prosecution of such trespasses.

S. W. LAMOREUX,
Commissioner.

Approved.

HOKE SMITH, *Secretary.*

UNITED STATES *v.* TYGH VALLEY LAND AND LIVE STOCK CO.

Circuit court, district of Oregon (76 Fed. Rep., 693).

TRESPASS ON GOVERNMENT LANDS—REMEDY.

The United States has the same right as a private owner to institute legal proceedings to protect its property from threatened injuries.

SAME—IMPLIED LICENSE.

There is no implied license to use for pasture purposes public land reserved for the preservation of forests, to the destruction or injury of such forests.

BELLINGER, *D. J.*

It is contended in support of the demurrer to the complaint that the act of March 3, 1875, "to protect ornamental and other trees on Government reservations and on lands purchased by the United States and for other purposes," does not apply to a case like this. That act makes it an offense against the United States to unlawfully cut or injure trees

standing upon reserved or purchased lands of the United States, or to break fences inclosing such lands, or to break or open such fences, and drive cattle, horses, or hogs upon such land, for the purpose of destroying the grass or trees thereon, or to knowingly permit such animals to enter, through any such inclosures, upon the lands of the United States. The injury threatened in this case is from the pasturing of sheep upon an uninclosed forest reservation. The act in question, so far as it relates to the pasturage of reserved or purchased lands of the United States, refers only to inclosed lands. The acts complained of are therefore not criminal under the laws of the United States. It does not follow that the Government is without civil remedies to protect its property from the threatened injury. It is held in Cotton *v.* United States (11 How., 229) that the rights of the United States as to its public lands are the same as those of any owner of private property, and that it may therefore maintain trespass against any person trespassing upon such lands, either by cutting and carrying away timber or otherwise. The following quotation embodies the opinion of the court in its main part:

> Every sovereign State is of necessity a body politic or artificial person, and as such capable of making contracts and holding property, both real and personal. It is true that in consequence of the peculiar distribution of the powers of government between the States and the United States offenses against the latter as a sovereign are those only which are defined by statute, while what are called "common law offenses" are the subjects of punishment only by the States and Territories within whose jurisdiction they are committed. But the powers of the United States as a sovereign dealing with offenders against their laws must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers can not affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan *v.* United States (3 Wheat., 181): "It would be strange to deny them a right which is secured to every citizen of the United States." In United States *v.* Bank of the Metropolis (15 Pet., 392) it was decided that when the United States by their authorized agents become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In United States *v.* Gear (3 How., 120) the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.

It is argued that there is an implied license from the United States to pasture these lands, growing out of the custom that has existed from the beginning of the Government, by which the public lands have been so used. In Buford *v.* Houtz (133 U. S., 320, 10 Sup. Ct., 305), it is held that there is an implied license, growing out of the custom of nearly one hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth

and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of the Government forbids their use. But there is a clear distinction between public lands and lands that have been severed from the public domain, and reserved from sale or other disposition under general laws. Such a reservation severs the land reserved from the mass of the public domain, and appropriates it to a public use. (Wilcox *v.* Jackson, 13 Pet., 498.) It is in furtherance of the policy of the Government by which the public domain is held for settlement that it shall be free to such use by the people as serves the convenience of settlers on uninclosed portions of it without public detriment. The reservation of the lands in question is an appropriation to a special public use, and is therefore a disposal of them, so far as the public domain is concerned. This appropriation is for the promotion of the public good. It is claimed for the Government that the pasturage of these lands with sheep will injuriously affect the forests of the reservation, and thus tend to defeat the object for which the reservation was made. If this is true, there is no reason why the Government should not be entitled to such civil remedy to prevent the threatened injury as is available to any other owner of property. As was said in Cotton *v.* United States (supra), "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they (the United States) were not entitled to the same remedies for their protection." The object of the reservation is the preservation of the forests of the Cascade Range of mountains in Oregon, and there is therefore no implication of a license to use the reserved lands to the destruction or injury of these forests. The Government, no less than a private party, is entitled to have its interests protected against the threatened trespass and injury. The demurrer to the complaint is overruled.

RIGHT OF WAY THROUGH FOREST RESERVATIONS.

HAMILTON IRRIGATION COMPANY.

[21 L. D., 330.]

In application for right of way privileges under the act of March 3, 1891, where the proposed location is upon or traverses a forest reservation, the Department should require a stipulation on the part of the applicant that no timber will be taken from the land within the reservation outside of the reservoir, or from land not occupied by the waterway.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1895.

With your office letters of September 25 and October 8, last, were submitted articles of incorporation, due proof of organization, filed by the Hamilton Irrigation Company of California, together with maps of location showing a proposed reservoir site, together with a pipe line

leading therefrom, on account of which application is made for right of way under the provisions of the act of March 3, 1891 (26 Stat., 1095).

The proposed reservoir is entirely within the San Gabriel timber land reserve, part of the same being on surveyed and part on unsurveyed land, and the pipe line on account of which the right of way is applied for lies partly within said reserve.

This reserve was created by the President's proclamation of December 20, 1892, and was designed to protect timber upon the lands reserved.

While the reservation in question is no bar to the approval of the right of way under the act of March 3, 1891, supra, yet, under the terms of section 18 of that act, if these maps are approved the company would have the right to take from the public land adjacent to the reservoir and pipe line materials, earth, and stone necessary for the construction of the same.

I am therefore of the opinion that the interests of the Government require in this case, and all others of like nature, for the purpose of protecting the timber upon these reserves, that before approval of the maps of location covering these forest reserves an agreement should be filed by the company in which it stipulates not to take any timber from the lands within the Government reserve outside of the reservoir, or from lands not occupied by the pipe line.

I therefore herewith return the maps filed by the Hamilton Irrigation Company without action, and have to direct that you call upon them to file an agreement as above indicated before again submitting the maps for my consideration.

TIMBER ON MINING CLAIMS IN CERTAIN FOREST RESERVATIONS IN COLORADO.

[Act of February 20, 1896; 29 Stat., 11.]

AN ACT to open forest reservations in the State of Colorado for the location of mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the forest reservations in the State of Colorado, known as the Pikes Peak Forest Reserve, the Plum Creek Forest Reserve, and the South Platte Forest Reserve, established by Executive proclamations dated, respectively, March eighteenth, eighteen hundred and ninety-two, June twenty-third, eighteen hundred and ninety-two, and December ninth, eighteen hundred and ninety-two, in the State of Colorado, in accordance with section twenty-four of the act of March third, eighteen hundred and ninety-one, from and after the passage of this act shall be open to the location of mining claims thereon for gold, silver, and cinnabar, and that title to such mining claims may be acquired in the same manner as it may be acquired to mining claims upon the other mineral lands of the United States for such purposes: *Provided*, That all locations of mining claims heretofore made in good faith within said reservations, and which have been held and worked in the same manner as mining claims are held and worked under existing law upon the public domain, are validated by this act.

SEC. 2. That owners of valid mining locations made and held in good faith under the terms of this act shall be, and are hereby, authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim from which the timber is felled or removed, but no other timber shall be felled or removed from any other portions of said reservations by private parties for any purpose whatever.

EXTENT OF TIMBER PRIVILEGES UNDER ACT OF FEBRUARY 20, 1896.

[29 Stat., 11.]

Commissioner of the General Land Office to the Secretary of the Interior, October 16, 1896, in the timber trespass case of Kendall, Townsend, and Walter.

* * * * * * *

Inasmuch as the act of February 20, 1896 (29 Stat., 11), opening the Pikes Peak Forest Reserve for the location of mining claims, confines the felling and removing of timber from mining claims to "actual mining purposes in connection with the particular claim from which the timber is felled or removed," it appears that Townsend and Walter in cutting timber on their claims for sale for the purpose of raising money for the development of the claims, exceeded the privileges allowed in said act.

A reasonable construction of the wording of this act appears to confine the use of timber on such claims within a limit directly similar to that defined by the United States Supreme Court in dealing with the question whether timber might be taken from an unperfected homestead claim and sold for the purpose of expending the money derived from the sale in improvements on the claim; upon which point it was held that, while, perhaps, timber might be taken from such claims to be exchanged for timber or lumber to be applied direct to improvements thereon; yet, it could not be sold to raise money with which to make improvements on the land. (Case of Shiver *v.* United States, 159 U. S., 491.)

It, accordingly, appears that the timber taken from said mining claims, for use as stated, was procured in trespass.

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Approved by the Secretary of the Interior November 5, 1896.

PERMITS TO CUT PUBLIC TIMBER.

[Act of March 3, 1891; 26 Stat., 1093.]

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes,"

approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 5, 1891.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891, entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber-culture laws, and for other purposes,'" the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on the public land, applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, and Nevada, the District of Alaska, and the Territory of Utah.

2. The right of railroad companies to procure timber for construction purposes from the public land adjacent to the lines of their roads, authorized by the several granting acts and the act of March 3, 1875 (18 Stat., 482), is in no way enlarged by this act.

3. The act of June 3, 1878 (20 Stat., 88), authorizing the cutting of timber for building, agricultural, mining, and other domestic purposes

from public lands which are known to be mineral and not subject to entry under existing laws of the United States except for mineral entry, is not repealed by this act, but remains in force subject to the rules and regulations prescribed thereunder by the Secretary of the Interior.

4. Settlers upon the public lands, miners, farmers, and other bona fide residents in either of the States, District, or Territory named in this act, who have not a sufficient supply of timber on their own claims or lands for firewood, fencing, or building purposes, or for necessary use in developing the mineral and other natural resources of the lands owned or occupied by them, are permitted to procure timber from the public lands strictly for the purposes enumerated in this section, but not for sale or disposal or use on other lands or by other persons; but this section shall not be construed to give the right to cut timber on any appropriated or reserved public lands, and the Secretary of the Interior reserves the right to prescribe such further restrictions as he may at any time deem necessary, or to revoke the permission granted hereby in any case or cases wherein he has information that persons are abusing the conceded privileges, or where it is necessary for the public good.

5. Section 2461, U. S. Revised Statutes, is still in force in the States, District, and Territory named in this act, as well as in all other States and Territories of the United States. Its provisions may be enforced as heretofore against any person who shall cut or remove, or cause or procure to be cut or removed, or aid or assist or be employed in cutting or removing, any timber from public lands of any other character or description, or for any other use or purpose whatever than as above defined in sections 2, 3, and 4 of these rules and regulations, unless special permission is first obtained from the Secretary of the Interior specifically designating the particular sections or tracts from which timber may be cut, and under what restrictions and limitations.

6. Persons, firms, or corporations residing in either of the States, District, or Territory named in this act, who desire to procure permission to cut or remove timber from nonmineral public lands for purposes of sale or traffic, or to manufacture same into lumber or other timber product as an article of merchandise, or for any other use whatsoever other than as defined in sections 2, 3, and 4 of these rules and regulations, must *first* submit an application therefor in writing to the Secretary of the Interior, designating the lands by sections, townships, and ranges, if surveyed, and, if unsurveyed, describing the land by natural boundaries, and the estimated number of acres therein. They must also define the character of the land and the kinds of trees or timber growing thereon, giving an estimate as to the quantity of each kind, stating which particular kind or kinds they desire authority to cut or remove, and the specific purpose or purposes for which the timber or the product thereof is required. The application must be sworn to and witnessed by not less than four reliable and responsible citizens of the State, District, or Territory in which the land is situated, and who reside in the locality of the particular land described.

7. The petitioner or petitioners should also submit with the application such evidence as can be procured to conclusively show that the preservation of the trees or timber on the land described is not required for the public good, but that its use as lumber or other product and for the purposes named in the application is a public necessity. Upon receipt of the application, with accompanying papers, it will be duly considered, and if deemed for the public interest the desired permission will be granted, subject to such restrictions and limitations as may be deemed necessary; but if it shall appear that the cutting of timber in the locality described in the application will be detrimental to the public interests or infringe upon the rights and privileges of the settlers in that locality the application will be rejected.

8. In order that farmers who desire to have the forests preserved in the interest of water supply for irrigation and all others having adverse interests may have due notice of such applications, the parties making an application, as herein provided, shall cause a notice of such application, describing the lands and timber which it is desired to use, to be published at least once a week for three consecutive weeks, in a newspaper of general circulation in the State, District, or Territory, and also in a newspaper in the county, or, where there is more than one county, in each of the counties wherein the lands are situated, and a printed copy of the published notices must be submitted with the application, together with the affidavit of the publisher or foreman of each newspaper, attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

9. The cutting or removing of any timber from public lands described in an application, by or for the applicant, *before* authority has been officially granted by the Secretary of the Interior, will render the party so offending liable to prosecution for trespass and subject his application to rejection.

10. Sawmill owners, lumber dealers, and others, who in any manner "cause or procure" timber to be cut or removed from any public lands in violation of law or these rules and regulations, whether directly by men in their employ or indirectly through contract or by purchase, are equally guilty of trespass with the individuals who actually cut or remove such timber, and are alike liable to criminal prosecution. The procurer or manufacturer of timber so cut, as well as the purchaser of such timber or its products, is also liable in civil suit for the value thereof.

11. Special agents will diligently investigate and report all such cases to this office for proper action.

Very respectfully,

T. H. CARTER,
Commissioner.

Approved May 5, 1891.

JOHN W. NOBLE, *Secretary.*

The above act of March 3, 1891 (26 Stat., 1093), was made applicable to the Territories of New Mexico and Arizona by the act of February 13, 1893 (27 Stat., 444).

[Act of February 13, 1893; 27 Stat., 444.]

AN ACT to extend the provisions of section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, concerning prosecutions for cutting timber on public lands to Wyoming, New Mexico, and Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page ten hundred and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Wyoming," in said amended act, insert the words "New Mexico and Arizona."

PERMITS WILL NOT ISSUE TO CUT TIMBER ON MINERAL LANDS.

The act of March 3, 1891 (26 Stat., 1093), applies exclusively to such public lands as are nonmineral.

The act of June 3, 1878 (20 Stat., 88), and the rules and regulations prescribed thereunder by the Department of the Interior August 5, 1886 (see page 52), provide for the taking of timber from public mineral lands for certain specified purposes within the States and Territories named therein.

The action of the Department in abstaining in any case from granting a permit to cut timber on a tract claimed to be mineral land does not, however, establish that the lands are mineral as contemplated by the act of June 3, 1878 (20 Stat., 88), nor relieve any person or persons from responsibility for cutting or removing timber therefrom should it subsequently be established that the lands are not mineral.

Parties who take timber from the public lands under assumed authority of said act of June 3, 1878, do so at their own risk, and must stand prepared to show that their acts are within the prescribed terms of the act granting such privilege; in other words, the burden is on such parties of proving by a preponderance of evidence that the land from which the timber is taken is "mineral" within the meaning of said act, should the question at any time be raised as to the character of the land.

TIMBER PERMITS—UNSURVEYED LANDS WITHIN THE PRIMARY LIMITS OF A GRANT TO A RAILROAD COMPANY.

[14 L. D., 126.]

Secretary Noble to the Commissioner of the General Land Office, February 3, 1892.

I have considered the question presented in your letter of January 20, 1892, relative to the granting of permits, under the eighth section of the act of March 3, 1891 (26 Stat., 1093), to cut timber from the unsurveyed

lands within the primary limits of the grant for the Northern Pacific Railroad Company. * * *

Under the acts of Congress making a grant to aid in the construction of this road, which is a grant in præsenti, the title passes to all lands of the character described therein, free from claims or rights at the date of the definite location of the road, whether surveyed or unsurveyed.

The road has long ago been located and constructed through the State of Montana, in which the tracts specially referred to in your letter lie.

Until surveyed it can not with any degree of certainty be held that any particular piece of land will, upon survey, form a part of an even-numbered section, and in the absence of a showing that the land is mineral in character no disposition should be made of any of the lands within the limits of said grant, nor any permit issued to remove timber from the same prior to the survey by the United States.

TIMBER PERMITS—UNSURVEYED LANDS WITHIN INDEMNITY LIMITS OF A RAILROAD GRANT.

[18 L. D., 74.]

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

I am in receipt of your office letter of December 1, 1893, in which it is stated that application has been made for permit to cut timber from unsurveyed lands within the indemnity limits of the grant for the Northern Pacific Railroad Company under the act of March 3, 1891 (26 Stat., 1093), and in view of the directions given in departmental letter of February 3, 1892 (14 L. D., 126), a ruling is asked upon the authority to grant the permit in question.

In the matter under consideration in the communication of February 3, 1892 (supra), the land was situated within the primary limits of the grant opposite which the road had been definitely located and constructed.

The company's right to the odd-numbered sections within said limit had therefore attached, and as they had not been separated from the even sections remaining to the United States by survey, it was directed that no permit be granted.

In the present case the land is within the indemnity limits.

The rights of the company in the granted and indemnity limits are widely different. All previous withdrawals made of indemnity lands on account of this grant were revoked by departmental order of August 15, 1887, and the lands not embraced in pending selections were ordered restored.

Within the indemnity limits it is held by this Department that the company has no right, in the absence of due and specific selection made in the manner prescribed by the regulations.

It is further held that selections can not be made of unsurveyed lands, consequently the company has no claim to the unsurveyed lands within its indemnity limits, and I can see no objection to granting the permit, if otherwise regular and proper, upon the condition that the same shall

become inoperative as to any tract selected by the company under its grant, upon the presentation in due form of a proper list by the company embracing any of the lands covered by the permit.

Approved:

JOHN I. HALL,
Assistant Attorney-General.

FOREST FIRES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 13, 1897.

For the information of all concerned, attention is called to the following act of Congress, approved February 24, 1897, entitled "An act to prevent forest fires on the public domain."

Registers and receivers, United States land offices, and special agents, General Land Office, should promptly report to the proper United States attorney all information they may receive relative to the violation of the provisions of this law.

E. F. BEST,
Acting Commissioner.

Approved:

C. N. BLISS,
Secretary.

[Act of February 24, 1897; 29 Stat., 594.]

AN ACT to prevent forest fires on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall wilfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situate.

CRIMINAL PROCEEDINGS.

In addition to the penalties prescribed in the above act, section 4 of the act of June 3, 1878 (20 Stat., 89), provides that "it shall be unlawful to" * * * "wantonly destroy any timber growing on any lands of the United States" in "the States of California, Oregon, and Nevada and in Washington Territory"; and "any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars." (See act cited in full on page 67.)

This act is made applicable to all the public-land States by the act of August 4, 1892 (27 Stat., 348; see page 70).

CIVIL REMEDIES.

In addition to the wanton destruction of public timber by fire, or otherwise, being a criminal offense, the United States have all the common-law civil remedies, whether for the prevention or redress of injuries, which individuals possess. (See 3 Wheaton, 181, and 11 Howard, 229, under "Civil Liability," page 15.)

The following notice was prepared for posting generally throughout the forests on the public lands:

NOTICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 12, 1894.

The attention of the public is called to the fact that immense areas of the public forests are annually destroyed by fire, originating in many instances through the carelessness of prospectors, campers, hunters, sheep herders, and others, while in some cases the fires are started with malicious intent.

Warning is hereby given that the origin of all forest fires will be closely investigated, and where the fire is ascertained to have originated through carelessness or design the persons implicated will be prosecuted to the full extent of the law.

The public generally is requested to aid the officers of the Government in its efforts to check the evil referred to and in the punishment of all offenders.

EDW. A. BOWERS,
Acting Commissioner.

Approved:

HOKE SMITH,
Secretary.

See, also, Forest reservation notice, on page 133.

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TABLE OF CASES CITED.

ACTS OF CONGRESS CITED AND CONSTRUED.

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